Ontario

REPORT OF THE ONTARIO PROVINCIAL COURTS COMMITTEE

1988

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Ontario

Ontario Provincial
Courts Committee

Comité des
cours provinciales
de l'Ontario

3rd Floor
10 King Street East
Toronto, Ontario
M5C 1C3

3e étage
10, rue King est
Toronto (Ontario)
M5C 1C3

September 27, 1988

The Lieutenant-Governor in Council
Province of Ontario
Room 285
Legislative Building
Queen's Park
Toronto, Ontario
M7A 1A1

Dear Sir:

Pursuant to s.88 of the Courts of Justice Act, 1984, S.O. 1984, c.11, the Ontario Provincial Courts Committee has the honour of presenting its unanimous conclusions and recommendations with respect to the remuneration, allowances and benefits of Provincial Court judges in Ontario.

In reaching its conclusions the Committee proceeded in accordance with the legislation and with the terms of the letter of agreement dated July 21, 1987, between the Attorney General of Ontario, the Honourable Ian Scott, on behalf of the Government of Ontario, and Paul French, counsel for the associations representing the three divisions of the Provincial Court.

Pursuant to paragraph 4 of the letter of agreement, this report is also being presented to the Chairman of the Management Board of Cabinet.

Respectfully yours,

Gordon F. Henderson

Gordon F. Henderson

Mary Eberts

Mary Eberts

William C. Hamilton

Ontario

Ontario Provincial
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M5C 1C3

September 27, 1988

The Honourable Murray Elston
Chairman
Management Board of Cabinet
7th Floor, Frost Building South
7 Queen's Park Crescent
Toronto, Ontario
M7A 1Z6

Dear Mr. Elston:

Pursuant to paragraph 4 of the letter of agreement dated July 21, 1987, between the Attorney General of Ontario, the Honourable Ian Scott, on behalf of the Government of Ontario, and Paul French, counsel for the associations representing the three divisions of the Provincial Court, the Ontario Provincial Courts Committee has the honour to present its unanimous conclusions and recommendations with respect to the remuneration, allowances and benefits of Provincial Court judges in Ontario.

Pursuant to s.88 of the Courts of Justice Act, 1984, S.O. 1984, c.11, this report has been presented simultaneously to the Lieutenant-Governor in Council.

Yours sincerely,

Gordon F. Henderson

Gordon F. Henderson

Mary Eberts

Mary Eberts

William C. Hamilton

ACKNOWLEDGEMENTS

Throughout our inquiry we have had the support of many persons, all of whom we thank. In particular, we thank Paul French and Donald Francis, counsel for the Provincial Court Judges' Associations and the Ontario government, respectively. Throughout the lengthy and difficult process of gathering information and hearing argument, both cooperated in every way with our inquiry. Each took pains to obtain the information we requested and both maintained consistently high standards of professionalism and advocacy. Much of the depth and range we sought to impart to our report was only possible because of them.

The groups and individuals who made presentations to our Committee gave us the benefit of their several perspectives on, and their first-hand experience with, the Provincial Court. We truly appreciate the time they took to share their views with us. In many areas our understanding is better because of the insights we gained from those submissions.

This Committee has also benefited from the administrative support provided by Keith Norris and Susan Dunn of the Office of Judicial Support Services in the Ministry of the Attorney General. Their support was always rendered in a timely and cooperative fashion.

Our special thanks go to Mr. Kerry Wilkins, whom we employed to coordinate and analyze the material and submissions we received, ferret out additional information we requested and assist us in the writing of this report. His diligence, cooperation and continued good humour were appreciated.

Gordon F. Henderson
Mary Eberts
William C. Hamilton

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I. INTRODUCTION

A. THE PROVINCIAL COURTS IN ONTARIO

1. Context

Within Ontario's justice system, the Provincial Court is the court of first resort for most legal disputes. It decides approximately 93% of all criminal matters and approximately 77% of all family law matters dealt with in the province.[1] For many

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[1] The following figures will indicate the volume of cases Provincial Courts process annually. According to Ministry of the Attorney General statistics on in-court dispositions for 1987-88, the Provincial Court (Criminal Division) disposed of a total of 387,575 charges under the Criminal Code and other federal statutes, including charges against accused young offenders 16 and 17 years of age. In the District Court and the High Court of Justice, there were a total of 30,939 in-court dispositions of criminal matters in 1987-88. That means that about 93% of all criminal dispositions were dealt with in Provincial Court (Criminal Division). That percentage increases dramatically when the in-court dispositions of provincial offences and municipal bylaw infractions are included (the total number of in-court dispositions by the Criminal Division in 1987-88 was 1,537,067 charges), but the majority of those charges are dealt with at first instance by justices of the peace.

In 1987-88 the Provincial Court (Family Division) disposed of a total of 76,504 matters (including 32,012 charges against accused young offenders 12 through 15 years of age). This includes no divorce dispositions, because the Provincial Court (Family Division) has no jurisdiction over divorce. There are no statistics for total family law dispositions in the District Court and the High Court of Justice, but the total is about 23,180 (including 21,974 divorces), assuming that the percentage of non-divorce family law matters commenced in those courts is the same as the percentage of non-divorce family law dispositions among their cases heard without juries. On that basis, dispositions before the Provincial Court (Family Division) account for roughly 77% of all family law dispositions in Ontario. No statistics are available on the Provincial Court (Civil Division).

Ontario citizens the Provincial Court is the embodiment of the administration of justice, whether they meet the court as parties or as witnesses. This is the court in which the rule of law becomes a reality to the majority of individuals. Because it is so important, the Provincial Court must be in every sense more accessible to the people of the province than are the higher courts.[2] It is, accordingly, in session much more frequently, and in far more locations, than the other Ontario courts; its procedures are more informal, streamlined and flexible, and proceedings before it are typically much less expensive than those before higher courts. Although legal representation is increasing before the Provincial Court, judges must still be able to deal fairly and simply with numbers of people who appear without counsel.

For these reasons, the life of a Provincial Court judge can differ in several respects from that of a judge on a higher court. All court proceedings deal regularly with fundamental human concerns; in the Provincial Court, however, one sometimes finds a rawness, even a desperation, rarely found in other courts. Because the Provincial Court's primary purpose is to deal in volume with cases the system expects will be legally straightforward, the work of a Provincial Court judge historically has drawn heavily on common sense and basic good judgment. In the past several years, however, complex regulatory matters, more aggressive defence tactics and the introduction of the Charter of Rights have transformed the Provincial Court into a forum where legal decisions are required to be more sophisticated. Because of the relentless accumulation of matters that come to the Provincial Court for disposition, judges in that court almost never have the luxury of in-depth legal research or reflection about the merits of particular cases. In making most of their decisions, they must rely heavily on their accumulated intellectual capital, for there is limited opportunity for detailed assistance from counsel. And, not least, when Provincial Court judges have to travel -- as many do, particularly in the north -- they do not go to county towns but to more remote locations, which often lack such basic perquisites as a courtroom or a private room in which a judge may robe.

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[2] I.e., the District Court, the High Court of Justice and the Ontario Court of Appeal.

The impact the Provincial Court has on so many Ontario citizens makes it imperative that the quality of justice dispensed there be especially high. Each case that comes before the Provincial Court is of significance to the parties involved; the legal system is important to each person who appears there, regardless of his or her means. Precisely because the Provincial Court disposes of the vast majority of the cases that go to court, the service it provides in so doing must be exemplary.

It takes a special kind of lawyer to flourish as a judge of the Provincial Court. They are indispensable to the integrity of our justice system.

2. Description

The Provincial Court, as we know it now, first came into being in 1968, when the Ontario legislature, acting upon recommendations of the McRuer Commission,[3] passed legislation[4] replacing the magistrates' courts and the juvenile and family courts[5] with the Criminal and Family Divisions, respectively, of the new Provincial Court. It was that statute that first gave Ontario's provincially appointed judges a measure of formal independence from the provincial executive. It created a judicial council to deal independently with complaints about Provincial Court judges and to advise the Attorney General about candidates for provincial judicial appointments[6] and it gave Provincial Court judges security of tenure until age 65.[7]

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[3] Royal Commission Inquiry into Civil Rights (1968) ["the McRuer Report"], Report No. 1, chs. 39-40.

[4] The Provincial Courts Act, 1968, S.O. 1968, c. 103.

[5] For brief descriptions of the operations of the magistrates' courts and the juvenile and family courts, see the McRuer Report, note 3 above, chs. 39-40, and the Report of the Ontario Courts Inquiry (1987) ["the Zuber Report"], pp. 23-28.

[6] The Provincial Courts Act, 1968, ss. 7-8.

[7] The Provincial Courts Act, 1968, ss. 4-6.

The Provincial Court (Civil Division) originated separately and much later; it began as a pilot project in 1979 to reconstitute the small claims courts in Metropolitan Toronto and to increase their monetary jurisdiction from $1000 to $3000.[8] In 1982 the arrangement was made permanent within Metropolitan Toronto.[9]

Both the Provincial Courts Act and the Provincial Court (Civil Division) Act were superseded, effective January 1, 1985, by Part IV of the Courts of Justice Act, 1984.[10] Part IV now governs the constitution and operations of the Provincial Courts in Ontario.

a. Appointment and Terms of Office

Provincial Court judges in Ontario are appointed by the Lieutenant Governor in Council on the recommendation of the provincial Attorney General;[11] any such recommendation must await, and take into account, a report on the candidate from the Judicial Council for Provincial Judges.[12] Provincial Court judges appointed since January 1, 1985 have been subject to the same minimum qualification as candidates for appointment to the higher courts: at least ten years as a qualified lawyer in Canada.[13] Before that date there was no formal requirement that Provincial Court judges be qualified lawyers;[14] as a matter of practice, however, only qualified lawyers have been appointed to the Provincial Court since its inception in 1968. At present there are only three sitting Provincial Court judges who were not members of the Ontario bar at the time of their appointment; the most recently appointed of them was appointed in 1967.[15] All but 48 of the approximately 233 Provincial Court judges now sitting[16] had been qualified lawyers for at least ten years at the time of their appointment.[17]

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[8] The Provincial Court (Civil Division) Project Act, 1979, S.O. 1979, c. 67.

[9] S.O. 1982, c. 58. The title of the statute then became the Provincial Court (Civil Division) Act.

[10] Courts of Justice Act, 1984, S.O. 1984, c. 11, ss. 52-88.

[11] Courts of Justice Act, 1984, s. 52(1).

[12] Courts of Justice Act, 1984, s. 58(1). The Judicial Council for Provincial Judges consists of the Chief Justice of Ontario, the Chief Justice of the High Court, the Chief Justice [sic] of the District Court of Ontario, the Chief Judges of the three divisions of the Provincial Court, the treasurer of the Law Society of Upper Canada and two other persons appointed by the Lieutenant Governor in Council: s. 57(1).

Once appointed, Provincial Court judges are, to all intents and purposes, secure against removal from office until they reach age 65, the statutory age of retirement.[18] No Provincial Court judge may be removed from office before age 65 unless the Judicial Council for Provincial Judges has received a complaint about the judge[19] and unless the Lieutenant Governor in Council has appointed a Supreme Court judge to inquire formally whether the judge should be removed.[20] Even then, he or she may not be removed unless the inquiry concludes that his or her infirmity, failure to act or unbecoming conduct disables or incapacitates him or her from due execution of the judicial office and recommends his or her removal specifically on those grounds.[21] Only the Lieutenant Governor may remove a Provincial Court judge from office, and he or she may do so only on the address of the legislature.[22]

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[13] Courts of Justice Act, 1984, s. 52(2). Compare Judges Act, R.S.C. 1970, c. J-1, s.3, as amended by S.C. 1976-77, c. 25, s. 1.

[14] Section 9(3), of the Provincial Courts Act, R.S.O. 1980, c. 398, provided, however, that no Provincial Court judge could try criminal matters arising under federal legislation unless he or she: (a) were a qualified lawyer; (b) had been a Provincial Court judge for at least five years, or (c) had been a full-time magistrate, deputy magistrate or juvenile or family court judge at the time the original Provincial Courts Act came into force in 1968.

[15] Answer of the Provincial Court Judges to the Questions Asked by the [Provincial Courts] Committee, June 27, 1988, p. 9.

[16] According to information supplied by the Ontario government, there are 236 Provincial Court judges sitting full-time at present; according to information supplied by the associations representing the three divisions of Provincial Court judges, there are currently 233 full-time Provincial Court judges.

[17] Answer of the Provincial Court Judges, note 15 above, p. 9.

[18] Courts of Justice Act, 1984, s. 54(1).

Provincial Court judges who have reached age 65 may continue in office full-time or part-time until age 70, subject to the annual approval of the Chief Judge of the division to which they have been assigned; judges who wish to continue sitting after reaching 70 require the annual approval of the provincial Judicial Council. All Provincial Court judges must leave office at age 75.[23]

b. Jurisdiction

Regardless of the division in which they sit, all Provincial Court judges now have,[24] and have had since 1968,[25] all the authority any Provincial Court judge is given by statute. In principle, any Provincial Court judge may be asked at any time to exercise the court's criminal, family and civil jurisdiction. In practice, however, that rarely happens. Instead, Provincial Court judges are almost always appointed with one of the court's three divisions in mind; upon appointment, they spend their time in office presiding over cases that arise in that division.[26] We therefore set out separately the jurisdiction of the judges in the three divisions.

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[19] Section 59 of the Courts of Justice Act, 1984 sets out the procedure the Judicial Council is to follow in dealing with the complaints it receives. In appropriate cases the Judicial Council may recommend to the Attorney General that there be a formal inquiry into the question of the judge's removal from office, but only if the judge has first been notified of the Judicial Council's own investigation and been given an opportunity to be heard and present evidence on his or her own behalf.

[20] Procedures governing the Supreme Court judge's inquiry are set out in s. 60 of the Courts of Justice Act, 1984.

[21] Courts of Justice Act, 1984, s. 56(1).

[22] Courts of Justice Act, 1984, s. 56(2).

[23] Courts of Justice Act, 1984, s. 54.

[24] Courts of Justice Act, 1984, s. 61(1).

i. the criminal division

All proceedings in criminal matters under the Criminal Code[27] and other federal criminal law[28] begin in the Provincial Court (Criminal Division). Judges of that division share with justices of the peace[29] the power to receive informations laying criminal charges,[30] to issue search warrants,[31] summonses and warrants for arrest,[32] and, for accused charged with all but the

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[25] The Provincial Courts Act, 1968, S.O. 1968, c. 103, s. 9.

[26] A few judges, especially in northern Ontario, are assigned upon appointment to both the Criminal and Family Divisions of the court and preside over matters from both domains.

[27] R.S.C. 1970, c. C-34, as amended.

[28] Under s. 27(2) of the Interpretation Act (Canada), R.S.C. 1970, c. I-23, as amended, the provisions of the Criminal Code apply with respect to indictable offences and summary conviction offences created under federal enactments.

[29] Criminal Code, s. 2 "justice."

[30] Criminal Code, s. 455.

[31] Criminal Code, ss. 443-444.

[32] Criminal Code, ss. 455.1-456.3, 458.

most serious offences,[33] to dispose of applications for judicial interim release (bail).[34] Normally justices of the peace are the ones who perform these functions; Provincial Court judges typically do so only when a matter is unusually important or complex.

Provincial Court judges have long had jurisdiction to try, without a jury, all federal summary conviction offences;[35] as a result of a number of legislative amendments in recent years, their trial jurisdiction over indictable offences has also become almost unlimited. Some indictable offences[36] may be tried only before a Provincial Court judge; almost all others may be tried, at the option of the accused, either before a Provincial Court judge sitting without a jury or before a higher court, with or without a jury.[37] The only offences that may not be tried before a Provincial Court judge are murder, treason, and the other, rarer offences listed in s. 427 of the Criminal Code.[38] Even that limitation does not apply when proceedings are brought in the youth court and the accused is 16 or 17 years of age.[39] Whenever someone charged with an indictable offence is not to be tried before a Provincial Court judge,[40] a judge of the Criminal Division is required to hold a preliminary inquiry,[41] to ascertain whether there is sufficient evidence to put the accused on trial.[42]

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[33] Murder, treason, piracy, alarming Her Majesty, intimidating Parliament or a legislature, inciting to mutiny and sedition. See Criminal Code, s. 427.

[34] Criminal Code, ss. 457-457.6. Only judges of superior courts of criminal jurisdiction (the High Court of Justice in Ontario) may hear and determine applications for bail from accused charged with offences listed in s. 427 of the Criminal Code: s. 457.7.

[35] Criminal Code, ss. 2 "provincial court judge," 720(1) "summary conviction court," 733-739; Interpretation Act (Canada), as amended, s. 27(2).

[36] Listed in s. 483 of the Criminal Code.

[37] Criminal Code, ss. 464, 484, 488-495.

[38] In addition, the Attorney General has authority, under s. 498 of the Criminal Code, to require any accused charged with an offence punishable by at least five years' imprisonment to be tried before a jury. Because Provincial Court judges are not authorized to do jury trials, the effect of such an election is to remove those specific cases from the trial jurisdiction of the Provincial Court (Criminal Division).

In addition, judges of the Criminal Division have jurisdiction to deal with all charges brought under Ontario legislation,[43] except those matters specifically assigned to the Family Division.[44] Again, justices of the peace most often try provincial or municipal offences; it is unusual for judges themselves to do so. Criminal Division judges have appellate jurisdiction over decisions of justices of the peace -- or even of District Court judges sitting as justices of the peace[45] -- in municipal and provincial offence proceedings.[46]

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[39] Both the Provincial Court (Criminal Division) and the Provincial Court (Family Division) are designated as youth courts for purposes of the Young Offenders Act, S.C. 1980-81-82, c. 110, as amended: Courts of Justice Act, 1984, ss. 67(2), 75(1)(b). As a matter of administrative practice, the Criminal Division deals with criminal charges brought against young persons 16 and 17 years of age; the Family Division deals with charges brought against young persons 12 through 15 years of age.

Section 16 of the Young Offenders Act authorizes the youth court, after taking certain specified factors into account, to transfer proceedings involving young persons 14 years of age and older into adult court, if the young person or the Attorney General has requested the transfer. Once proceedings against a young person are transferred into adult court, they are subject to the jurisdictional rules that apply there.

[40] This can happen either because the accused elects to be tried by a higher court judge, with or without a jury (Criminal Code, ss. 464, 488), or because the offence is one of those listed in s. 427 of the Criminal Code and cannot be tried before a Provincial Court judge.

[41] Criminal Code, ss. 463-478. Section 476(1) authorizes an accused to waive all or part of a preliminary inquiry. Section 507 permits the preferment of a direct indictment without a preliminary inquiry, but only with the written personal consent of the Attorney General or the Deputy Attorney General or upon the order of a judge.

[42] See Criminal Code, s. 475.

ii. the family division

Leaving aside divorce, which the federal government has entrusted exclusively to the superior courts,[47] and questions of family property, which cannot for constitutional reasons be dealt with by the provincial courts,[48] there are few if any family law matters that lie outside the jurisdiction of the Family Division. Judges of the Family Division[49] may authorize changes of name,[50] dispense with parental consent to underage marriage,[51] appoint guardians of children's property,[52] order spousal or child support,[53] custody and access,[54] vary their previous orders for support, custody or access,[55] and enforce provisions for custody or support contained in domestic contracts[56] or in foreign[57] or domestic court orders.[58] It is the Family Division, as well, that hears and determines applications for adoption,[59] wardship and child protection orders.[60] In addition to their responsibilities in these essentially civil proceedings, the judges of the Family Division have exclusive jurisdiction over any provincial offences arising under Parts III (Child Protection) and VII (Adoption) of the Child and Family Services Act, 1984[61] and over all provincial offence proceedings brought against young persons 12 through 15 years of age.[62] They also preside over any criminal matters brought in youth court against young persons of those ages.[63]

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[43] Courts of Justice Act, 1984, s. 68(2); Provincial Offences Act, R.S.O. 1980, c. 400, as amended, s. 30. For an example of an Ontario statute with particularly complex offence provisions, see the Environmental Protection Act, R.S.O. 1980, c. 141, as amended.

[44] Pursuant to s. 91a of the Provincial Offences Act and ss. 70(1) and (2) of the Courts of Justice Act, 1984, the Provincial Court (Family Division) has exclusive jurisdiction over all provincial offence proceedings brought against young persons 12 through 15 years of age and over any charges brought under Part III (Child Protection) or Part VII (Adoption) of the Child and Family Services Act, 1984, S.O. 1984, c. 55.

[45] R. v. Valente (1982), 39 O.R. (2d) 413 (H.C.J.).

[46] Provincial Offences Act, R.S.O. 1980, as amended, ss. 99(2)(a), 118.

[47] Divorce Act, 1985, S.C. 1986, c. 4, s. 2(1) "court."

[48] Constitution Act, 1867, s. 96; Re: B.C. Family Relations Act, [1982] 1 S.C.R. 62.

[49] In the Judicial District of Hamilton-Wentworth, this jurisdiction is exercised by the Unified Family Court. Courts of Justice Act, 1984, ss. 38-51.

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[50] Change of Name Act, 1986, S.O. 1986, c. 7, ss. 1 "court," 4-7.

[51] Marriage Act, R.S.O. 1980, c. 256, ss. 1(1)(c), 6.

[52] Children's Law Reform Act, R.S.O. 1980, c. 68, ss. 18(1)(a), 48-51, added by S.O. 1982, c. 20.

[53] Family Law Act, S.O. 1986, c. 4, ss. 1(1) "court," 33-34.

[54] Children's Law Reform Act, ss. 18(1)(a), 21-22, 25, 28-29, added by S.O. 1982, c. 20.

[55] Family Law Act, ss. 1(1) "court," 37-38; Children's Law Reform Act, ss. 18(1)(a), 21, 28-29, added by S.O. 1982, c. 20.

[56] Family Law Act, s. 35. The court may, however, disregard any provision in a domestic contract that deals with child support or custody, if in its opinion the child's best interests would be served by doing so: s. 56(1).

[57] Support: Reciprocal Enforcement of Maintenance Orders Act, 1982, S.O. 1982, c. 9. Custody: Children's Law Reform Act, ss. 18(1)(a), 41-47, added by S.O. 1982, c. 20.

[58] Support: Courts of Justice Act, 1984, s. 76(3)(h); Rules of the Provincial Court (Family Division), Regulation 810, R.R.O. 1980, as amended, Rule 80a; Support and Custody Orders Enforcement Act, 1985, S.O. 1985, c. 6, ss. 8,9, 11, 13. Custody: Children's Law Reform Act, ss. 18(1)(a), 35-40, added by S.O. 1982, c. 20.

[59] Child and Family Services Act, 1984, S.O. 1984, c. 55, s. 3(1) para. 11, Part VII, as amended.

iii. civil division

The Provincial Court (Civil Division) has jurisdiction over any civil action for the payment of money or the recovery of property where the value at issue is not more than $1000;[64] within the Judicial District of York, that limit is raised to $3000.[65] Because there are only thirteen judges appointed to the Civil Division, and ten of those are in Metropolitan Toronto, this jurisdiction is most often exercised either by District Court judges sitting as judges of the Civil Division[66] or by practicing lawyers appointed as part-time deputy judges of that division.[67]

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[60] Child and Family Services Act, 1984, S.O. 1984, c. 55, s. 3(1) para. 11, Part III.

[61] Courts of Justice Act, 1984, s. 75(1)(a)(ii).

[62] Provincial Offences Act, s. 91a; Courts of Justice Act, 1984, s. 75(1)(a)(i).

[63] Courts of Justice Act, 1984, s. 75(1)(b). See note 39, above.

[64] Courts of Justice Act, 1984, s. 78(1).

[65] Courts of Justice Act, 1984, ss. 78(2).

[66] Courts of Justice Act, 1984, s. 77(2)(b).

[67] Ibid., s, 77(3). Deputy judges may be appointed by any judge of the District Court or the Provincial Court (Civil Division), subject to the approval of the Attorney General. No deputy judge may preside in an action where the value at stake is more than $1000.

B. THE ONTARIO PROVINCIAL COURTS COMMITTEE

1. Appointment and Terms of Reference

The Ontario Provincial Courts Committee (the "Committee") is established by s. 88 of the Courts of Justice Act, 1984, S.O. 1984, c. 11, "to inquire into and make recommendations to the Lieutenant Governor in Council respecting any matter relating to the remuneration, allowances and benefits of provincial judges."[68] According to s. 88(1) of the Act, the Committee is to have three members: one appointed jointly by the Provincial Judges Association (Criminal Division), the Ontario Family Court Judges Association and the Provincial Court Judges Association of Ontario (Civil Division) ("the judges' associations"); one appointed by the Lieutenant Governor in Council, and a chairman appointed jointly by the Lieutenant Governor in Council and the judges' associations.[69]

The Committee's current members are:

Chairman: Gordon F. Henderson, (Ottawa)
Judges' Nominee: Mary Eberts (Toronto)
Government Nominee: William C. Hamilton (Guelph)

Ms. Eberts was appointed by the judges' associations on December 7, 1987; Order in Council 439/88, dated February 18, 1988,[70] acknowledges Ms Eberts' appointment and confirms the appointments of Mr. Henderson and Mr. Hamilton.

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[68] Courts of Justice Act, 1984, ss. 88(2), 87(1)(b),(c). The text of ss. 87 and 88 is set out in full as Appendix A.

[69] This appointment scheme differs from that prescribed in s. 19.3 of the federal Judges Act, R.S.C. 1970, c. J-1, as amended by S.C. 1980-81-82-83, c. 50, s. 12, which provides for triennial inquiry and recommendations about the salaries and benefits appropriate for the judges appointed federally. All the commissioners involved in that process are appointed by the federal Minister of Justice.

[70] Reproduced as Appendix B of this report.

Our operations were further prescribed by the terms of a letter of agreement dated July 21, 1987 between the Attorney General of Ontario, the Honourable Ian Scott (on behalf of the Ontario government) and Paul French, who has acted throughout as counsel for the judges' associations.[71] Pursuant to that agreement, Committee members are to be paid honoraria for the time they devote to Committee business;[72] the Committee itself is to have its own operating budget and hire its own staff. The agreement entitles representatives of the judges' associations and the Ontario government to make written submissions to the Committee, to reply in writing to each other's submissions and to make oral presentations; the Committee, however, may, in the presence of counsel for these two parties, conduct any hearings and receive any other submissions that it considers necessary. Paragraph 4 of the agreement requires that we issue our report within six months of the date of our appointment.

Finally, and most importantly, the Ontario government has undertaken in that agreement to give this Committee's recommendations "the fullest consideration and very great weight" in determining what compensation Provincial Court judges are to receive. After having done so, the government will table legislation providing for the judges' salaries and for automatic annual salary increases for those subsequent years in which judges' salaries are not dealt with by legislative amendment. The legislation will also make Provincial Court judges' salaries, for the first time, a charge on the provincial Consolidated Revenue Fund, instead of an item in the annual process of legislative fiscal appropriation.

There is one minor respect in which the agreement and the statute seem to give the Committee conflicting instructions. According to ss. 88(2) and (3) of the Courts of Justice Act, the Committee is to make its recommendations and annual reports to the Lieutenant Governor in Council; according to paragraph 4 of the agreement, it is to issue this report to the "Chairman of Management Board." This Committee has sought to comply with both instructions by addressing its report to the Lieutenant

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[71] The text of that agreement is reproduced as Appendix C.

[72] Paragraph 3 of Order in Council 439/88 specifies the amount of the honorarium.

Governor[73] and by submitting the report simultaneously to the two relevant offices. The confusion about reporting instructions will doubtless be dispelled in the promised legislation.

2. The Conduct of the Present Inquiry

We have sought to take full advantage of the resources and the range of inquiry provided for in the agreement of July 21, 1987. After securing an operating budget, approved by Management Board of Cabinet and set aside within the appropriation to the Office of Judicial Support Services in the Ministry of the Attorney General, we hired Mr. Kerry Wilkins to be our research officer. We solicited submissions from the judges' associations, the Ontario government and interested members of the bar and the public. Advertisements were published in the Lawyers Weekly (February 19, 1988), the Globe and Mail (February 24, 1988), the Sudbury Star (February 24, 1988) and the Thunder Bay Times (February 25, 1988), inviting submissions either in writing or at oral hearings to be held at five locations throughout the province.[74] Hearings were held, in the presence of counsel for the Ontario government and for the judges' associations, at the following times and places:

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[73] This has been the practice of the Provincial Courts Committee since late 1983, when the statutory reporting requirements now codified in ss. 88(2) and (3) of the Courts of Justice Act, 1984 were first proclaimed in force (as ss. 35(2) and (3) of the Provincial Courts Act, R.S.O. 1980, c. 398, as amended by S.O. 1983, c. 78, s. 2(2)). Before that the Committee took its reporting instructions from s. 2(3) of Order in Council 643/80, dated March 5, 1980. It required the Committee to "report from time to time with respect to matters involving financial remuneration to the Chairman of the Management Board of Cabinet and with respect to other matters within its functions to the Attorney General for Ontario."

[74] A copy of the advertisement appears as Appendix D.

Ottawa	March 14, 1988
London	March 15, 1988
Sudbury	March 21, 1988
Thunder Bay	March 22, 1988
Toronto	March 30, 1988
	March 31, 1988

On May 9, 1988, a day set aside for other Committee business, the Committee received one additional oral submission. Counsel for both primary parties were permitted to question those who made oral presentations. Copies of the written submissions and transcripts of the oral hearings went routinely, at Committee expense, to counsel for the parties.

In total there were 39 written submissions and 27 oral presentations made by a total of 48 individuals and organizations.[75] These submissions were in addition to the more detailed material we received from the primary parties. Both the Ontario government and the judges' associations gave the Committee detailed briefs, supported by volumes of documentation. On March 21, 1988, after having reviewed their submissions, we asked them to provide specific additional information and to answer a number of questions intended to clarify their positions and resolve a few factual discrepancies. At the end of the scheduled hearings, we invited them to give us written replies, not only to each other's submissions, but to all the presentations we had received. The Ontario government included its answers to our questions in its reply submission, which we received on May 5, 1988; the judges' associations filed their reply brief on June 17th and their answers to our questions on June 27th. Only the judges' associations accepted our invitation to call oral evidence; we heard from Mr. Martin Brown, an actuary, on June 2 and July 6, 1988. We heard final oral submissions from the judges' associations on July 7, 1988. The Ontario government made its final submissions, in writing, on July 15, 1988; the judges' associations' final reply submissions were delivered in writing on July 22, 1988.

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[75] Appendix E lists everyone who made written or oral submissions to the Committee.

3. The Context of the Present Inquiry

What makes the present Committee different from its predecessors is the difference in the climate within which it has been asked to report. Provincial Court judges' occupational concerns have for many years been a source of tension between the judges and the Ontario government. In the years since the last Provincial Courts Committee made recommendations, the judges have felt that the government has neglected these concerns.

a. Historical Background

In 1971 the salaries the federal government paid the County and District Court judges began to increase more rapidly than those the Ontario government paid the Provincial Court judges. Briefly in 1973 that salary gap was eliminated; since then, however, the District Court judges have always been paid more than Provincial Court judges in Ontario. Many Provincial Court judges have long thought any such differential to be unfair.[76] In addition, until July 1, 1984, Provincial Court judges' pension entitlements were the same as those provided to Ontario public servants by the Public Service Superannuation Act, R.S.O 1980, c. 419, as amended ("PSSA"). The PSSA scheme, which calculates the retirement pension as two per cent of a member's best five year average salary times the member's number of years of service (up to 35),[77] seemed to many judges to provide them with inadequate retirement income, because most judges are appointed relatively late in life and do not have time before retirement to accumulate anything close to the maximum number of years of service required for a full pension.

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[76] The Attorney General of the day, the Honourable Arthur Wishart, did say, in the legislative debates that led to the enactment of The Provincial Courts Act, 1968, that the salary of the Provincial Court judges "is going to be the same" as that of the County and District Court judges: Hansard, May 22, 1968, p. 3255.

[77] PSSA, s. 14(1). If the person is also entitled to an allowance from the Canada Pension Plan, the amount of the PSSA benefit is reduced to blend with that allowance.

Until 1980, there was no recognized mechanism by which Provincial Court judges could effectively bring these and other occupational concerns to the government's attention. On December 13, 1979, the government and the judges agreed that an independent advisory committee would be established to receive and make recommendations about the judges' compensation. On March 5, 1980, Order in Council 643/80 created the Provincial Courts Committee. On December 16, 1983, amendments to the Provincial Courts Act first provided a statutory basis for the Committee and its operations.[78]

On December 10, 1980 the first Provincial Courts Committee recommended that Provincial Court judges receive an interim increase of $5000 per year, retroactive to October 1, 1980; the government responded by increasing salaries $6000 per year, effective April 1, 1981. On May 8, 1981, the Committee made a series of recommendations about some compensation issues other than salary. One of those recommendations was that Provincial Court judges be entitled to an annual allowance of up to $1000 to cover expenses necessary and incidental to their office. The government responded by providing such an allowance, effective October 1, 1981.[79] On March 27, 1984 the Committee recommended implementation of a pension and survivor benefits scheme designed uniquely for Ontario's Provincial Court judges: a scheme that would improve significantly the retirement allowances payable to the vast majority of the judges. The Ontario government implemented the scheme virtually without alteration, effective July 1, 1984,[80] and acceded to all the Committee's subsequent technical refinements of the plan.

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[78] Provincial Judges and Masters Statute Law Amendment Act, 1983, S.O. 1983, c. 78, s. 2(2), adding s. 35 to the Provincial Courts Act, R.S.O. 1980, c. 398.

[79] Regulation 811, R.R.O. 1980, s. 9, added by O.Reg. 177/82, s. 1, as amended by O.Reg. 227/85, s. 3.

[80] O.Reg. 332/84, as amended.

After making its interim salary recommendation on December 10, 1980, the first Provincial Courts Committee returned to the subject of salaries in its report of January 30, 1981. In that report the Committee considered the recommendations of the McRuer Commission in 1968 and those of the Ontario Law Reform Commission in 1973 on the salaries appropriate for provincially appointed judges in Ontario; it also weighed the findings of a 1973 report the judges' associations had commissioned from P.S. Ross and Partners on Provincial Court judges' compensation. Observing that "an ever-widening gap" had developed since 1974 between the salaries of Provincial Court judges and those of County Court Judges, despite "an opposite trend to expand the jurisdiction and responsibilities of provincial court judges,"[81] that Committee concluded that "there is no justifiable basis for paying provincial court judges less than county court judges" and recommended that "serious consideration be given to eliminating the disparity that now exists."[82] More specifically, it recommended an immediate increase for 1981 and further increases for subsequent years "so as to achieve equality of remuneration between the provincial court judges and the county court judges by April 1, 1985."[83] On May 28, 1981, representatives of the Premier's office, Management Board of Cabinet, the Provincial Courts Committee and the judges' associations met with Premier Davis to discuss the Committee's long-term salary recommendation; nothing, however, was decided at that meeting about its implementation.

On October 15, 1985, the Committee wrote that it was in no position to make recommendations on the subject of salary until it received a response from the government to that 1981 recommendation.[84] Ten days later, on October 25, 1985, the

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[81] Report of the Ontario Provincial Courts Committee, January 30, 1981, p. 2.

[82] Ibid.

[83] Ibid., at p. 3.

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> "Although it is clear that the 1981 recommendation of our predecessors has not been implemented, the government of Ontario has not, to the best of our knowledge, formally stated its position on the

chairman of Management Board of Cabinet, the Honourable Elinor Caplan, announced in the legislature that the Ontario government had "decided not to accept the 1981 recommendation of the Ontario Provincial Courts Committee to establish parity between the salaries of Provincial Court judges and those of federally-appointed District Court judges."[85]

During the four year period between the submission of the Committee's salary recommendation and the government's response to it, Provincial Court judges were not denied salary increments altogether; nonetheless, their financial position deteriorated dramatically. Until the Ontario government announced that it could not accept the notion of salary parity between Provincial and District Court judges, Provincial Court judges would quite reasonably have compared their own compensation with that received by the judges appointed to the District Court. In those years the gap between the salaries paid to those two groups increased by 50%: from $12,000 on January 30, 1981 to $18,045 on October 25, 1985.[86] If the salary increments both groups later

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> recommendation. In order for the present Committee to be in a position to make recommendations on the question of salaries, we consider it essential that the government formally respond to the 1981 recommendation."

Report of the Provincial Courts Committee, October 15, 1985, p. 1. The Committee did, however, go on to make a salary recommendation in that same report.

[85] Statement to the Legislature by the Honourable Elinor Caplan, Chairman, Management Board of Cabinet and Minister of Government Services, October 25, 1985, p. 3.

[86] According to Ontario government figures, Provincial Court judges received $56,000 annually until April 1, 1981; in October, 1985 they were receiving $71,855. (The latter figure was subsequently raised to $75,000 retroactive to April 1, 1985.) District Court judges received $68,000 in January, 1981; on October 25, 1985, they were receiving $89,900 (raised subsequently to $103,000 retroactive to April 1, 1985): see Report of the Provincial Courts Committee, October 15, 1985, at p. 1. Salary figures for the District Court judges include

received retroactive to April 1, 1985 are taken into account, the salary gap between them grows to $28,000, an increase of 133% since 1980.[87]

More significant still was the decline during those years of the actual purchasing power of Provincial Court judges' salary dollars. According to figures the government itself provided, Provincial Court judges' salaries had increased 16.5% faster than the cost of living[88] from 1970 through 1980.[89] Between January 30, 1981 and October 25, 1985, however, a period during which the cost of living increased by 43.1%,[90] Provincial Court judges' salaries increased by only 28.3%.[91] Expressed in 1985 dollars, it would have taken a salary of $80,125.92 to provide Provincial Court judges equivalent purchasing power to what they had in 1980. In late October, 1985 Provincial Court judges were being paid $71,855 annually.

Despite its stated misgivings about making any salary recommendation until the Ontario government responded formally to the recommendation from 1981,[92] the Provincial Courts Committee did recommend, on October 15, 1985, that Provincial Court judges' salaries be increased immediately to $80,000, retroactive to April 1, 1985. This was an amount slightly less

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the $3000 they receive annually from the province of Ontario, pursuant to s. 99 of the Courts of Justice Act, 1984.

[87] See figures cited at note 86, above.

[88] As measured by the Consumer Price Index, published by Statistics Canada.

[89] Provincial Court judges' salaries increased by 133.3% between 1970 and 1980; the CPI in those same years increased by 116.8%.

[90] CPI figures were 88.9 for the year 1980 (1981 = 100) and 127.2 for the year 1985.

[91] This calculation ignores the subsequent retroactive increase in Provincial Court judges' salaries to $75,000, mentioned in note 86, above.

[92] See note 84, above and the text accompanying it.

than a full restoration of the judges' 1980 purchasing power. The Ontario government accepted the retroactivity date, but declined to increase the judges' annual salaries to more than $75,000, because of "the well-recognized need for restraint in the expenditure of the province's financial resources."[93]

When the Committee received the government's answer to its salary recommendation, the judges' nominee resigned. He had only concurred in that recommendation, he said, on the understanding that the government was prepared to implement it. Had he known that the $80,000 figure would not be acceptable to the government, he would have made a separate recommendation for a more generous salary increase. Responding to the resignation, the Chairman of Management Board replied that she had had no authority to give the Committee any advance undertaking that its salary recommendation would be accepted and that, in fact, there had been no undertaking. Because of this incident, however, the judges' associations withdrew from any further participation in the Provincial Courts Committee. The Committee ceased to operate and relations between the judges and the government became especially strained.

Until 1980, the year the first Provincial Courts Committee was appointed, Provincial Court judges' salaries not only kept up with inflation; they grew at a rate that exceeded it. In the years since the Committee has begun to function, those salaries have fallen behind, despite a Committee recommendation that would have kept them well ahead of inflation. The Committee's latest recommended salary increase was cut by the government by more than half.[94] Whatever may be the actual reasons why the

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[93] Statement to the Legislature by the Honourable Elinor Caplan, note 85 above, at p. 4.

[94] The Provincial Courts Committee has made no recommendations of any kind since October 15, 1985. Since 1985, the Ontario government has, again, given modest annual salary increases on its own to the Provincial Court judges. According to Ontario government figures, Provincial Court judges' salaries increased by 8.68% from April 1, 1985 through the end of 1987 (taking into account the subsequent increases retroactive to April 1, 1985 and April 1, 1987, respectively.) During that same period, the CPI increased by 8.72%.

Ontario government has dealt with Provincial Court judges' salaries, and with Committee recommendations, in the manner it has since the inception of the Committee, it would not be unreasonable for the Provincial Court judges to infer that the government has had very little regard for the Committee or its salary recommendations.

On June 9, 1986, the Ontario Courts Advisory Council[95] passed a unanimous resolution expressing the Council's great regret at the "impasse that appears to be continuing between the Provincial Court Judges and the Government of Ontario" and its "serious concern . . . that if the problem is not resolved, ultimately it will have an adverse effect on the administration of justice in this Province." The Chief Justice of Ontario sent copies of the resolution to the Premier, the Attorney General, the Chairman of Management Board and the president of the Association of Provincial Criminal Court Judges of Ontario.

On January 2, 1987 the Provincial Criminal Court Judges' Special Committee on Criminal Justice in Ontario issued a lengthy report detailing its members' concerns about the administration of criminal justice in Ontario's Provincial Courts and their suggestions for the system's improvement;[96] that report purported to reflect, generally speaking, the views and concerns of the judges of the Provincial Court (Criminal Division).[97] That committee's report devotes ten pages[98] to the judges' continuing dissatisfaction over being paid less than the District Court judges and to the committee's misgivings about the process that included the Provincial Courts Committee. The "persuasive value" of the Committee's recommendations "appeared to be non-existent," the report said, and it had fallen into "misadventure" when its recommendations "became those which were neither ideal nor appropriate, but those which might be implemented." The Provincial Courts Committee "has so far been unable to satisfy the expectations of the parties that it be an acceptable institutional arrangement providing an objective guarantee of judicial independence."[99]

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[95] The Ontario Courts Advisory Council comprises the Chief Justices and Chief Judges of all three levels of Ontario courts, the Associate Chief Justices and Chief Judges, and the Senior Judge of the Judicial District of York: "Report on the Administration of Justice in Ontario on the Opening of the Courts for 1986" (1986), 20 L.S.U.C. Gazette 6, at p. 10.

[96] Report of the Provincial Criminal Court Judges Special Committeee on Criminal Justice in Ontario, January 2, 1987.

[97] Ibid., at p. 1.

[98] Ibid., pp. 49-59. Appendix B to that report, pp. 96-102, contains a number of public statements in support of the special committee's views about the salary issue.

On April 24, 1987, all the Provincial Court judges in Ontario met to consider their options collectively. At a press conference after that meeting their counsel, Mr. French, announced that the judges had passed a resolution requesting the personal intervention of the Premier.[100]

It was three months later, on July 21, 1987, that the Attorney General and Mr. French signed the agreement to reactivate the Provincial Courts Committee; it set out the guidelines under which the Committee was to operate.[101]

b. The Present Compensation Regime for Provincial Court Judges

We now provide a general overview of the forms and amounts of compensation Provincial Court judges currently receive. Particular benefits are described in greater detail in Part IV of this report, which sets out and explains our recommendations.

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[99] Ibid., pp. 58-59.

[100] Press Conference Notes for Paul J. French, LL.B., legal counsel to the Provincial Court Judges of Ontario, on the matter of "Provincial Court Judges' Resolution to Premier Peterson," April 24, 1987, Royal York Hotel, Toronto, Ontario, pp. 12-14.

[101] The text of this agreement is attached to this report as Appendix C.

Ontario currently ranks fourth among provinces, and behind the two territories, in the salaries it pays its Provincial Court judges.[102] According to a 1987 survey done by the Canadian Association of Provincial Court Judges, Ontario ranks seventh (out of twelve) in the value of the pension it provides to Provincial Court judges with 20 years' service, and ties for fifth in the overall value of its non-salary benefit package.[103]

i. numbers, ranks and salaries of judges

At present there are approximately 233 Provincial Court judges in Ontario: 160 in the Criminal Division; 60 in the Family Division, and 13 in the Civil Division. Among these there are three Chief Judges (one in each division), two Associate Chief Judges (one each in the Criminal and Family Divisions) and eighteen Senior Judges.[104] The remaining 210 judges have no administrative duties. The current annual salary for Provincial Court judges is $81,510; Senior Judges, Associate Chief Judges and Chief Judges receive $83,029, $86,254 and $90,565, respectively.[105]

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[102] Both the Ontario government and the judges' associations provided salary figures for Provincial Court judges in the other provinces. Although the two sets of figures do not always agree, Ontario ranks fourth on either reckoning. Quebec, Alberta and British Columbia are the three provinces that pay their Provincial Court judges more than Ontario.

[103] Canadian Association of Provincial Court Judges, Survey, 87.

[104] The Ontario government and the judges' associations were unable to agree about the exact number of Provincial Court judges in Ontario. The figures in the text are those of the judges' associations; the Ontario government's figures are: 236 judges; 161 judges in the Criminal Division; 61 Family Division judges; 14 Civil Division judges, and 21 Senior Judges.

[105] Regulation 811, R.R.O. 1980, s. 2, Schedule, as amended by O.Reg. 61/88, s. 1.

ii. judges' retirement income

Each Provincial Court judge who retires having met the basic service requirement for pension entitlement (an age of at least 65 and years of service plus years of age that together equal 80 or more) receives an annual income continuity payment of from 45% to 55% of the salary of judges of the highest judicial rank that judge held while in office. The exact percentage depends on the judge's age when he or she leaves office.[106] Special rules apply to judges appointed at the age of 60 or later; they must serve until at least the age of 70 to earn pension income, and the percentage of final salary on which their entitlement is based is reduced by 5% for each year of age in excess of 60 they had reached when they were appointed.[107] Judges who serve for at least fifteen years but leave office before age 65 are also entitled to income continuity payments on leaving office, but the amount of those payments is reduced by 5% for each year by which the judge's age is less than 65 at the time he or she elects to begin receiving pension income.[108] Other, more arcane provisions govern rarer cases.

These provisions apply automatically only to judges appointed on or after July 1, 1984. Two separate rules apply to judges appointed before that date. Those who were serving on or after October 1, 1979, are entitled to income continuity payments calculated either in accordance with the rules just described or in accordance with the provisions of the PSSA, whichever is to the benefit of the individual judge.[109] Judges who left office before October 1, 1979 continue to receive whatever pension benefits they had earned through the PSSA; those who had met the current basic service requirement when they left office also receive a supplementary allowance that brings their total benefit to 45% of their final salaries as judges.[110]

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[106] O.Reg. 332/84, as amended, ss. 2, 3, Table 1.

[107] O.Reg. 332/84, as amended, s. 4, Table 2.

[108] O.Reg. 332/84, as amended, s. 9.

[109] O.Reg. 332/84, as amended, ss. 40-43b. The PSSA calculation is set out in the text accompanying note 77, above.

[110] O.Reg. 332/84, as amended, s. 45.

All judges' income continuity payments are adjusted in accordance with increases in the salaries of sitting judges.[111] The supplementary allowance awarded to certain judges who left office before October 1, 1979 is indexed in the same manner as benefits under the PSSA.[112]

iii. survivor benefits

All full-time Provincial Court judges carry group life insurance coverage, equal to five times their salary, until they leave office, meet the basic service requirement for pension entitlement or reach the age of 70, whichever occurs first.[113] By law, the judge's spouse is the beneficiary of this coverage; where there is no spouse, the judge's children under the age of 18 are the legal beneficiaries.[114]

After the judge leaves office, meets the basic service requirement or reaches the age of 70, the group life insurance coverage reduces in stages to $2000, $1750 and finally $1500.[115] To provide for the spouses of judges who die after one of these three events, the pension plan for Provincial Court judges includes a survivor allowance. Spouses of judges who die in office after having met the basic service requirement receive an allowance annually of one-half the amount the judge would have received if he or she had served until the age of 75 before dying.[116] Spouses of judges who die after leaving office receive an allowance equal to one-half the amount of any income continuity payment the judge was receiving, or was entitled to receive, at death.[117] If there is no surviving spouse, or if the surviving spouse dies while receiving the allowance, the benefit goes instead to any children of the judge who are under the age of 18.[118]

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[111] O.Reg. 332/84, as amended, s. 10.

[112] O.Reg. 332/84, as amended, s. 45(4). Such benefits are indexed to increases in the cost of living, as measured by the Consumer Price Index, subject to an aggregate annual ceiling of 8%: see Superannuation Adjustment Benefits Act, R.S.O. 1980, c. 490, s. 4.

[113] O.Reg. 332/84, as amended, s. 31.

[114] O.Reg. 332/84, as amended, ss. 31(2), 14(1), 15(1). Children still in full-time attendance at school or university remain contingent beneficiaries until they reach age 25: s. 17.

[115] O.Reg. 332/84, as amended, s. 31a.

[116] O.Reg. 332/84, as amended, s. 11.

Provincial Court judges contribute 5.57% of their salary to the combined cost of the group life insurance and the survivor allowance.[119]

iv. sickness and accident protection

Each Provincial Court judge who works at least 20 consecutive working days in a given calendar year is entitled to up to 130 working days' (about six months') leave at regular pay for sickness or accident.[120] A medical certificate may be required at any time, and will be required after seven calendar days' continuous absence.[121]

Judges who are still under care and totally disabled after six months or more begin receiving benefits from the long term income protection plan. The plan pays two-thirds of the judge's regular salary until he or she recovers from the total disability, dies or reaches the age of 65, whichever comes first. The Ontario government pays 85% of the premium for this coverage; the remaining 15% is borne by participating judges.[122]

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[117] O.Reg. 332/84, as amended, s. 12.

[118] O.Reg. 332/84, as amended, ss. 14-15. Children still in full-time attendance at school or university remain entitled to the allowance until they reach the age of 25: s. 17.

[119] O.Reg. 332/84, as amended, s. 24.

[120] O.Reg. 332/84, as amended, s. 29.

[121] O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, as amended, s. 68.

[122] O.Reg. 332/84, as amended, s. 30.

v. other insurance coverage

The Ontario government pays Provincial Court judges' OHIP premiums[123] and the premiums of those receiving income continuity payments or survivor allowances.[124] In addition, Provincial Court judges are entitled, at their option, to participate in the supplementary health and hospital insurance and dental plans that the Ontario government makes available to its management level employees.[125] The Ontario government pays all premiums for both plans.[126] Optional vision care and hearing aid insurance is also available; the cost of that premium is shared equally by the government and by participating judges.[127] Provincial Court judges may also participate, at their own expense, in the supplementary life insurance coverage available to management level government employees.[128]

vi. vacation and leave

Provincial Court judges are given the same statutory holidays as management level employees of the Ontario government.[129] They also share with those employees the

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[123] O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, as amended, s. 85.

[124] O.Reg. 332/84, as amended, s. 33a(a).

[125] O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, as amended, ss. 83-84.

[126] The government also pays the supplementary health and hospital insurance premiums (but not dental plan premiums) of all those receiving income continuity payments or survivor allowance payments: O.Reg. 332/84, as amended, s. 33a(b).

[127] O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, as amended, s. 83(2)-(4).

[128] O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, as amended, ss. 79-80.

[129] O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, as amended, s. 63.

"management compensation option." Under the compensation option, a judge (or an employee) is entitled to five days' extra salary or to five days' leave at regular pay each year, in addition to his or her regular salary or vacation entitlement.[130] In their own right, Provincial Court judges are entitled to one month's annual vacation; unused days may be carried forward from one year to the next.[131] There is also provision for maternity leave[132] and for certain forms of discretionary leave, with or without pay.[133]

vii. allowances

The Ontario government reimburses Provincial Court judges' reasonable transportation expenses incurred in the course of carrying out judicial duties; where such transportation requires the use of a judge's private car, the government pays a mileage allowance in respect of the distance the judge has travelled. Judges are also reimbursed for meal expenses while on duty, subject to maximums that apply throughout the Ministry of the Attorney General, and for the fees and reasonable expenses that flow from attendance at legal and judicial conferences. In addition to all the specific allowances they receive, Provincial Court judges are also given allowances of up to $1000 per year for other reasonable expenses incidental to the proper execution of the judicial office.[134] Claims in excess of $1000 against this allowance in one year may be charged against the subsequent year's entitlement.[135]

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[130] O.Reg. 332/84, as amended, ss. 32(1)-(2), incorporating Regulation 881, R.R.O. 1980, as amended, s. 15.

[131] Regulation 811, R.R.O. 1980, s. 6.

[132] O.Reg. 332/84, as amended, s. 30a.

[133] Regulation 811, R.R.O. 1980, as amended, ss. 3-5; O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, as amended, s. 75.

[134] Regulation 811, R.R.O. 1980, as amended, s. 9.

[135] Regulation 811, R.R.O. 1980, as amended, s. 9(5).

viii. other miscellaneous benefits

Finally, Provincial Court judges share with management level Ontario government employees rights to a salary supplement for up to three months' time off work because of work-related illness or injury,[136] to a termination benefit of up to six months' salary when they leave office,[137] and to a death benefit of up to one month's salary if they die while in office.[138] The amount of the death benefit payable to a judge's estate is set off against the amount of any termination benefit to which the judge would have been entitled on leaving office.[139]

c. Positions of the Principal Parties

For convenience, we set out here the most important submissions offered by the Ontario government and the judges' associations. Any comments we may have on the parties' positions appear in subsequent parts of this report.

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[136] O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, as amended, s. 67. Practically speaking, Provincial Court judges' entitlements to short-term and long-term sickness and accident leave make this supplement redundant.

[137] O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, as amended, ss. 86-93. Judges appointed on or after January 1, 1970 and who leave office because of death or retirement must complete at least one year in office to be entitled to the benefit (ss. 88(a), 89(1)(a)); judges in that group who leave office for any other reason must complete at least five years' service (ss. 88(b), 89(1)(b)). Judges who are removed from office do not receive the termination benefit with respect to service since the end of 1975.

[138] O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, as amended, s. 94. This benefit is only available in respect of those who have served for at least six months: s. 94(1).

[139] O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, as amended, s. 94(2).

In this Report, we have proceeded on the assumption that the submissions of the parties, summarized here, expressly alert us to all the factors the government and the judges' associations think we ought to consider in recommending Provincial Court judges' compensation.

i. The Judges' Associations

Throughout their submissions, the judges' associations emphasized the principle of judicial independence: its ancestry, its constitutional status as an underpinning to the rule of law, and the particular constraints it imposes on the personal lives of the judges themselves. Financial security, they submitted, is an essential component of judicial independence. A proper compensation scheme must recognize the financial position in which judicial appointment puts a person and guarantee his or her financial security within that context.

Two other principles were advanced by the judges' associations with respect to compensation. First, they said, compensation plans have three purposes: to retain the qualified incumbents in their present positions; to stimulate them to maintain high levels of performance, and to attract the most highly qualified candidates to fill vacancies. Because Provincial Court judges have had, on average, 16 to 20 years' experience in the practice of law by the time they are appointed, lawyers with that much experience should be, on this view, the target group in setting Provincial Court judges' salaries. It is unlikely that qualified, moderate lawyers within this group will continue to find Provincial Court appointments attractive unless the salary is comparable with amounts they are able to earn in private practice. And there is some danger that qualified sitting Provincial Court judges may leave the bench to seek other opportunities unless their remuneration as judges is reasonable. In particular, Provincial Court judges' salaries must be sufficiently close to the salaries paid to the District Court judges to give those sought for both positions some reason to incline toward Provincial Court.

Second, the judges' associations suggested that we apply independent job evaluation factors to the duties required of

Provincial Court judges, then compare the results with those for certain other offices. Appraised on the basis of the knowledge, the experience and the problem solving ability required of the various offices and the degree of responsibility that the positions entail, Provincial Court judges, they assert, rank with or slightly ahead of lawyers in private practice, federally appointed District Court judges, provincially appointed judges in other provinces and deputy ministers of the Ontario government. This is especially true, the submission continues, in view of the recent incremental growth of the substantive jurisdiction of the Criminal and Family Divisions of the Provincial Court and in view of the qualitative increase in the complexity of the cases Provincial Court judges now routinely hear.

Based on all these arguments, the judges' associations submitted that the salaries of Provincial Court judges ought to be set at a level that is comparable to the earnings of lawyers with 16 to 20 years' experience and to the salaries of the judges appointed by the federal government. The salaries of the judges with administrative responsibilities should continue to be somewhat higher, in recognition of the greater responsibilities and extra duties those judges bear. All Provincial Court judges' salaries, they submitted further, ought to be indexed to increases in the average industrial wage, as measured by the Industrial Aggregate.

On the subject of pensions, the judges' associations remain of the view that the income continuity payments paid to Provincial Court judges at retirement should be calculated in the same manner as the retirement allowances paid to retired judges of the higher courts: two-thirds of the salary of the highest judicial rank the judge attained while sitting. As an interim measure, they proposed that the current pension entitlement percentage range be increased by 10%: instead of extending from 45% to 55%, the range would extend from 55% to 65% of a judge's final salary. In addition, they submitted, Provincial Court judges should once again have the option -- they do not have it at present -- of retiring at age 65 or later, collecting pension and serving thereafter as judges on a per diem basis. They also urged that we recommend that the survivor allowance increase to 60% from 50% of the judge's income continuity entitlement.

Although it was plain that salaries and pensions were the principal concerns of the Provincial Court judges in proceedings before us, the judges' associations also suggested adjustments and improvements in certain other benefits. Provincial Court judges' vacations, they said, should increase from one month to eight weeks annually. The Chief Judge should have expanded discretion to grant extended leave. Provincial Court judges should be entitled, as of right, to up to a year's sabbatical leave after six consecutive years of judicial service. The maternity allowance should be increased significantly. Judges should be eligible for paid paternity or adoption leave. There should be minor improvements in the supplementary medical and dental insurance coverage and in the group life insurance provided to retired Provincial Court judges. The mileage allowance, for use of judges' private automobiles on judicial business, and the meal allowance, for meal expenses incurred in the course of duty, should be liberalized. And the ceiling on the annual incidental expenditure allowance should increase to $2500 from the present $1000. Details of those submissions, and of other submissions on more minor matters, appear, where necessary, in our recommendations below.

ii. The Ontario Government

For its part, the Ontario government chose to take no position before us on most of the issues within our authority, because, to use the words of the government's final submission to the Committee, "[i]f the Government were to make specific recommendations to the Committee at this time, it would appear that the Government had formulated a position prior to receiving the Report of the Committee, which would be inappropriate."[140] We respect and appreciate the government's concern not to fetter our discretion.

The government did, however, identify several principles it suggested we bear in mind when preparing our report. First, it urged us not to consider the compensation issues before us in abstraction from one another, but to treat them as part of a single package of benefits. It is the aggregate cost of the compensation improvements that often determines whether a payor can accept the package proposed. This is called the "total compensation principle" in public sector interest arbitration.

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[140] Final Submission to the Ontario Provincial Courts Committee made on behalf of the Government of Ontario, July 15, 1988, at p. 1.

Second, the government suggested that we focus on those matters that represent the satisfaction of a demonstrated financial need, in order to confine our attention to issues that are truly essential. Although it acknowledged that

> [t]he public has an interest in ensuring that the persons sitting as Provincial Judges are fully qualified and competent to perform the duties of a Provincial Judge, and . . . that the rate of remuneration paid to Provincial Judges does not detract from that objective[,][141]

it added that

> it is also in the public interest that the costs associated with the administration of justice, as with all Government expenditures, be kept at a prudent level[. T]his objective acts as a limitation on the amount of remuneration which can be paid to Provincial Judges.[142]

In its final submissions to us, the government suggested implicitly that the judges' associations had not satisfied the onus of showing that many of the improvements they sought were indeed necessary.

The government did permit itself a few specific comments on the question of salary. Only at the margin, it said, is there any necessary relationship between judicial independence and the quantum of salary paid to Provincial Court judges. Unless the judges' salaries were so low that judges could not satisfy even the most basic needs for their families, one could not reasonably contend that the salary amounts they received had any effect on their independence. In addition, it pointed out, there is authority for the view that there is danger in setting judges' salary levels too high; the risk is that the bench will begin to attract a higher proportion of candidates interested in appointments primarily for financial reasons. Candidates whose primary interest in the bench is financial may well be less likely, it suggested, to exhibit the self-restraint that is so important if judges are to continue to uphold the rule of law.[143] Finally, if the Committee is seeking a relevant external benchmark for use in setting the salaries of provincial judges, the government is of the view that salaries paid to provincial court judges in the other provinces might well be the most appropriate. Nowhere else in Canada are provincial court judges' salaries the same as those the District Court judges receive. And the duties of judges and deputy ministers are not meaningfully comparable.

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[141] Ibid., at p. 5.

[142] Ibid.

It was on the issue of automatic annual salary adjustments that the Ontario government seemed to have the most pronounced views. It doubted the appropriateness of linking Provincial Court judges' salaries with either the Industrial Aggregate or the Consumer Price Index; even when such indices are used, it said, it is typical to impose a "cap" or ceiling on the percentage increase permitted. It rejected outright any suggestion of automatic linkage with salaries paid to judges in other Canadian jurisdictions. It proposed instead that the formula have a "made in Ontario" look, that it be "compatible with the financial outlook and philosophy of the Province of Ontario," and that the Committee

> recogniz[e] that there must be some degree of equity between the annual salary increases for Provincial Judges and the other persons whose salaries are funded by monies appropriated by the Ontario Legislature.[144]

Finally, it would be inappropriate, the government said, for any such formula to "have the effect of exempting Provincial Judges from any . . . constraints which might be imposed in the future on economic adjustments for other persons engaged in public service."[145]

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[143] See, e.g., Greenberg and Haley, "The Role of the Compensation Structure in Enhancing Judicial Quality" (1986), 15 J. Legal Studies 417. Mr. Greenberg submitted a copy of this article to the Committee for consideration.

[144] Submission to the Provincial Courts Committee made on behalf of the Government of Ontario, March, 1988, at pp. 30, 34.

The government's comments on other issues and on specific benefits will be set out and examined in more depth below.

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[145] Ibid., at p. 30.

II. COLLATERAL ISSUES AND OBSERVATIONS

We have aimed our inquiry -- and our recommendations-- at subjects that lie within the range of matters remitted to us by legislation and by the agreement of July 21, 1987. Even as we did so, however, we were surprised at how much of what was said before us -- especially at the oral hearings -- focused on matters that lay outside our authority. We heard, for instance, from two groups of provincial judicial appointees who are not Provincial Court judges -- the Supreme Court masters and the family law commissioners -- who consider that the Ontario government has not dealt adequately with their concerns about their own compensation or working conditions. In addition, we heard allegations from a number of judges and lawyers who practice in the Provincial Courts about courtroom facilities in several parts of the province that are severely overcrowded, downright makeshift or otherwise substandard, about the inadequacy of provisions for courtroom security, for support staff and for the judges' legal research needs, and about the daily pressures ,and frustrations that result from ever growing volumes of incoming cases and from a chronic shortage of sitting judges.

Because it is not our function to do so, we shall not comment in this report upon these allegations or upon what, if anything, the Ontario government ought to do about them: strictly speaking, they concern us only when and where they affect our thinking about the compensation proper to Provincial Court judges. We are nonetheless constrained to report the sense of urgency and frustration we felt from many of those who spoke of these matters:[146] more than one of them told us frankly that they were raising such issues with us, despite their recognition of the limited scope of our inquiry, because they knew of no other body to whom they could effectively make their complaints. If anything is clear from the submissions our Committee received, it is that the occupational concerns extend well beyond the categories of benefits, allowances and salaries, and that judges are not the only provincial judicial appointees to be concerned about occupational issues. Anyone with a serious interest in understanding and rectifying the discontent that besets provincial judicial appointees must make a broader inquiry than our terms of reference directed. Clearly there is a perception that this wider range of issues deserves independent public scrutiny.

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[146] As if in confirmation of the seriousness of these allegations, the Ontario government, after reminding us gently of the limits to our authority, spent very nearly one-third of its reply submission answering some of them.

We do not suggest that we be empowered to undertake this broader inquiry. The Ontario government is, however, already committed by its agreement with the judges' associations[147] to introducing legislation that will transform what is now called the Provincial Courts Committee into a Provincial Courts Commission. As it prepares that legislation, the government may wish to consider expanding the substantive authority of the proposed Commission, in order that the Commission might regularly provide considered advice on a more comprehensive range of occupational issues concerning Ontario judicial officers.

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[147] See Appendix C to this report.

III. THE GOVERNING PRINCIPLES

Before we set out our specific recommendations, we wish to identify and discuss the larger principles that have directed our thinking in this report. There are, as will emerge, three such principles: the imperative of an independent judiciary; the presumption that professionals will perform professionally if they are treated in a professional manner, and the importance of looking at the judges' compensation package as a whole.

A. JUDICIAL INDEPENDENCE

We begin by affirming the surpassing importance of an independent judiciary. Of all the propositions put before us, this was the least controversial. Judicial independence is an integral part of the heritage on which our legal system is built;[148] it is a constitutive element of our political culture.[149] It is in the courtroom that the rule of law is given its most concrete expression in the lives of individuals.[150] It is crucial that those who preside in courts of law be able to do so without any appearance of interference from anyone.[151] Only the law itself, as applied to a set of particular facts, must lead to the outcome of the dispute that the court is asked to resolve. As Chief Justice Dickson said recently, on behalf of a unanimous Supreme Court of Canada:

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[148] See, e.g., Lederman, "The Independence of the Judiciary," reprinted in Lederman, Continuing Canadian Constitutional Dilemmas (1981), at pp. 109-173.

[149] See generally The Queen v. Beauregard, [1986] 2 S.C.R. 56, per Dickson, C.J.C. at 69-74.

[150] The rationale for [the] modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it -- rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.

> The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.[152]

These imperatives clearly apply with equal cogency to the Provincial Courts.

But what, exactly, does judicial independence entail? By now there is little room for dispute about its essential contours. According to another recent Supreme Court of Canada judgment,

> [Judicial independence] connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.[153]

The Queen v. Beauregard, note 149 above, per Dickson, C.J.C. at 70.

[151] Ibid., per Dickson, C.J.C. at 69.

[152] Ibid., per Dickson, C.J.C., at 73 (emphasis in original). The court was not unanimous in disposing of the Beauregard case; the dissenting judges, however, expressly endorsed Chief Justice Dickson's discussion of judicial independence: ibid., per Beetz, J. at 100.

[153] Valente v. The Queen, [1985] 2 S.C.R. 673, at 685. Elaborating on this observation in the context of s. 11(d) of the Canadian Charter of Rights and Freedoms ("the Charter"), the Court added, at 688:

Such objective conditions, moreover, must be in place at both the individual and the institutional levels. Not only must individual judges be free from any suggestion of pressure, favour or influence; the courts of which they are members must be, and be seen to be, independent of government in all essential respects.[154]

We shall discuss later the obligations these requirements impose on government; we wish first to emphasize the impact they have on the lives of the judges themselves. No other group, in our view, is subject to a similar combination of constraints and responsibilities.

> Of course, the concern is ultimately with how a tribunal will actually act in a particular adjudication, and a tribunal that does not act in an independent manner cannot be held to be independent within the meaning of s. 11(d) of the Charter, regardless of its objective status. But a tribunal which lacks the objective status or relationship of independence cannot be held to be independent within the meaning of s. 11(d), regardless of how it may appear to have acted in the particular adjudication. It is the objective status or relationship of judicial independence that is to provide the assurance that the tribunal has the capacity to act in an independent manner and will in fact act in such a manner.

[154] It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government. . . . [A]n individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.

Ibid., at 687.

1. The Costs to the Judge of Maintaining Independence

At the heart of the notion of judicial independence is the conviction that individual judges must have "complete liberty . . . to hear and decide the cases that come before them . . ."[155] Here, as elsewhere, such liberty has both a negative and an affirmative aspect. Negatively, it means that nothing may constrain or distract the judge from entertaining the full range of available options for disposition of a particular case: the judge's bearings are to come exclusively from the law itself. Affirmatively, it means that the decision, irreducibly, is the judge's alone. Each of these aspects of their office sets judges apart from people in other callings.

Although it is traditional to be concerned about governmental interference with the judicial function, government is not the only source of danger to judges' independence: many others have something to gain or lose from the outcomes of particular disputes. Any significant connection a judge may have with such people or organizations threatens to predispose him or her toward certain solutions to legal problems involving them. Such potential predispositions are no more tolerable with respect to private parties than with respect to government. As Shimon Shetreet has said in Judges on Trial:

> Independence of the judiciary has normally been thought of as freedom from interference by the Executive or Legislature in the exercise of the judicial function. . . . In modern times, . . . [however,]. . . with the steady growth of the corporate giants, it is of utmost importance that the independence of the judiciary from business or corporate interests should also be secured. In short, independence of the judiciary implies not only that a judge should be free from governmental and political pressure and political entanglements but also that he should be removed from financial or business entanglements likely to affect, or

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[155] The Queen v. Beauregard, note 149 above, per Dickson, C.J.C. at 69.

> rather to seem to affect, him in the exercise of his judicial functions.[156]

Shetreet goes even further:

> A judge must be free from political or other pressures. This means that a judge must first be immune from such systems of distorting justice as direct pressure, bribery or approaches by the litigant, a friend or counsel; he must also be removed from any sophisticated entanglements, be they political, personal or financial, which might seem to influence him in the exercise of his judicial functions, let alone entanglements that might actually influence him.[157]

The consequence is that judges must, upon taking office, dissolve any business or financial connections they may have had before their appointment (and make no new ones while on the bench), terminate their political affiliations and withdraw (or distance themselves) from personal relationships they may have developed with former professional colleagues. In isolated cases, judges may, and do, disqualify themselves from presiding at matters involving individuals or organizations with whom or with which they have or have had some connection. The clear understanding is that they will arrange their affairs in such a way as to maximize their capacity to hear without conflict the cases within their court's jurisdiction. For those who preside in the smaller centres, where few other judges may be nearby to substitute in cases of possible conflict, the need for circumspection is acute.

Essential though they clearly are, such sacrifices and restrictions distort the lives of Provincial Court judges in several important ways. First, they keep to a minimum the occasions when judges may exercise their constitutionally guaranteed rights of association and free expression; whatever a judge's private convictions, he or she must subordinate them to the cultivated impartiality of the judicial role. Second, they isolate the judge from many ordinary forms of social interaction within his or her community. Such isolation breeds loneliness, especially in those accustomed to the collegial atmosphere in which most lawyers practice. Finally, and of particular significance for the present inquiry, the judge's unique position inhibits his or her ability to follow many business opportunities. Judges do not have the same flexibility of investment that they had as members of the practicing bar.

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[156] Shetreet, Judges on Trial (1976), at 17-18, quoted with approval in Valente v. The Queen, note 153 above, at 686.

[157] Ibid., p. 383. Emphasis in original.

The role of a judge is also materially different from that of civil servants. Civil servants, acting within the scope of their employment, are shielded from the consequences of their acts and omissions by the doctrine of ministerial responsibility; legislators are often protected by conventions of confidentiality and solidarity in caucus and Cabinet. The judge, however, stands alone[158] and on public display. He or she must face individually any criticism directed against his or her decisions or conduct as a judge.

Such criticism -- no matter how personal or how unfounded -- must be borne in silence: the canons of independence prohibit judges from making any public response. A judge's personal feelings of grievance must not be allowed to give anyone occasion to doubt the disciplined detachment of judicial deliberation.

2. The Obligations Independence Imposes on the Government

No matter how assiduously the judges themselves endeavour to shed any personal, political and financial connections that might distort their perspective from the bench, they cannot be truly independent unless they are also kept separate, together and individually, from the government that appoints and is paying them. The Supreme Court of Canada has identified three essential conditions that government must satisfy to achieve the minimum standard of judicial independence. One is security of tenure: the judge's term of office must be secure for its duration "against interference by the Executive or other appointing authority in a discretionary or arbitrary manner."[159] "It is sufficient if a judge may be removed only for cause related to the capacity to perform judicial functions."[160] A second is financial security:

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[158] Unlike judges on higher courts, who sometimes sit in panels of three or more to hear appeals, Provincial Court judges always preside alone.

> That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace or favour of the Executive.[161]

These two conditions both concern the individual independence of particular judges. The third concerns the relationship between the Ontario government and the Provincial Court as an institution: it addresses "the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function."[162] Among those matters identified as essential to collective independence are "assignments of judges, sittings of the court, and court lists -- as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions."[163]

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[159] Valente v. The Queen, note 153 above, at 698.

[160] Ibid., at 697.

[161] Ibid., at 704.

[162] Ibid., at 708.

[163] Ibid., at 709.

3. The Consequences of Independence for the Present Inquiry

What we have said so far about judicial independence we take to be uncontroversial. There was, however, some difference of opinion before us about the proper scope of the imperatives of independence and about the consequences for judicial compensation of affirming them. We identified a narrow and a broad view on these matters.

The narrow view of independence is that advanced by the government of Ontario in its submissions before us. In its reply submission, for instance, the government suggested that:

> [t]he independence of the judiciary . . . has little bearing on the matter before this Committee, that is, the quantum of the remuneration of Provincial Judges. Where Judges' salaries and benefits have been discussed in the caselaw and by commentators in connection with the independence of the judiciary, the focus has been on the requirement that it not be open to the Government to manipulate a particular Judge's salary to influence a particular decision.[164]

In its final submission, the government added:

> If there is a relationship between judicial independence and the amount of judicial salaries, as opposed to the security of judicial salaries, it is a negative relationship. That is to say, it could perhaps be reasonably argued that there has been an interference with judicial independence if, in a particular case, judicial salaries were so low that Judges could not provide for even the most basic needs of themselves and their families. In such a case, . . . perhaps . . . the amount of judicial salaries [would call] into question the independence of the judiciary. [S]uch is not the situation in Ontario . . .[165]

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[164] Reply Submissions to the Ontario Provincial Courts Committee made on behalf of the Government of Ontario, May 5, 1988, p. 19.

[165] Note 140 above, at p. 15.

These views are buttressed in those submissions by a number of quotations from the Zuber Report.[166] The two that follow appear to be the most important.

> In the final analysis we value and stress judicial independence for what it assures to the public, not for what it grants to judges themselves. Ultimately, the sole purpose of the concept is to ensure that every citizen who comes before the court will have his case heard by a judge who is free of governmental or private pressures that may impinge upon the ability of that judge to render a fair and unbiased decision in accordance with the law.[167]

> In our view, this factor is the key to what is essential, in the administrative sphere, for judicial independence: the judiciary, through its senior officers, must have the power to determine standards for matters that bear directly on the essential quality of justice in individual cases. . . . It is not essential to the quality of justice that the courts be housed in a particular way, that judges be provided with particular numbers or kinds of support staff or that judges be assured of any given level of salary or other benefits.[168]

Finally, the Supreme Court of Canada's unanimous decision in Valente v. The Queen,[169] although not cited for the purpose by the government, appears to lend some support to the narrower view. In that case, the court held the Provincial Court (Criminal Division) to be an "independent tribunal," for purposes of s. 11(d) of the Charter,[170] despite the fact that, among other things: its judges' salaries are fixed by regulation, not by statute, and are not a charge on the provincial Consolidated Revenue Fund;[171] the pension and other financial benefits available to its judges in 1982 were the same as those provided to provincial civil servants,[172] and certain leaves of absence available to judges were in the discretion of the provincial executive, not the Chief Judge of the division.[173]

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[166] Note 5 above.

[167] Ibid., at 150, quoting Watson, "The Judge and Court Administration" (1976), 5 The Canadian Judiciary 163, at 183.

[168] Zuber Report, note 5 above, at 149.

[169] Note 153 above.

Despite these antecedents, however, we cannot accept, for purposes of our inquiry, this narrow view of the impact of judicial independence. Although we agree with Mr. Justice Zuber that judicial independence matters for what it assures to the public, not for what it grants to judges,[174] we nonetheless believe that our affirmation of independence has a number of specific consequences for the design and the content of a compensation regime for Provincial Court judges. These conclusions require elaboration.

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[170] Section 11(d) of the Charter reads:

> 11. Any person charged with an offence has the right
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> . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[171] Valente v. The Queen, note 153 above, at 704-707.

[172] Ibid., at 707-712. On July 1, 1984, O.Reg. 332/84, the regulation creating a separate pension plan for Provincial Court judges, came into force.

[173] Ibid., at 712-714.

[174] See quotation at note 167, above.

a. The Consequences for Design of a Compensation Regime

First, the conception we espouse of an independent judiciary goes beyond the minimum standard the Supreme Court of Canada enforced in Valente. At issue there was not the articulation of an ideal standard of independence for judges; the task instead was to ascertain the absolute minimum conditions sufficient to make a tribunal (which might or might not be a court) independent enough to try offence proceedings. That distinction emerges clearly in the following passage.

> Reports and speeches on the subject of judicial independence in recent years have urged the general adoption of the highest standards or safeguards, not only with respect to the traditional elements of judicial independence, but also with respect to other aspects now seen as having an important bearing on the reality and perception of judicial independence. These efforts, particularly by the legal profession and the judiciary, to strengthen the conditions of judicial independence in Canada may be expected to continue as a movement towards the ideal. It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter, which may have to be applied to a variety of tribunals. . . . The essential conditions of judicial independence for purposes of s. 11(d) must bear some reasonable relationship to that variety.[175]

Repeatedly throughout the judgment, the Court observed that existing occupational arrangements for Provincial Court judges "fall short of the ideal"[176] and that higher standards of judicial independence, although not strictly speaking required, "may well be preferable"[177] or "desirable."[178]

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[175] Valente v. The Queen, note 153 above, at 692-693.

[176] Ibid., at 698. See also ibid., at 704.

[177] Ibid., at 708. See also ibid., at 706.

[178] Ibid., at 714. See also ibid., at 712.

We accept the invitation to endorse a higher standard. Judicial independence, in Canada, has constitutional status. Governments should always be prepared to hold themselves to higher standards of constitutional behaviour than those the courts are prepared to enforce against them.[179]

At present, judges are selected and compensated by those in the other branches of government. That fact alone is enough to create perpetual potential for interference by the government with the judiciary, whether or not individual litigants happen to be sensitive to that danger. In this context, fidelity to judicial independence requires that the ways in which the government-- or anyone -- might be in a position to exercise leverage on the Provincial Court or its judges be kept to an absolute minimum.[180] As the Supreme Court of Canada said in Beauregard:

> [o]n the institutional plane, judicial independence means the preservation of the separateness and integrity of the judicial branch and a guarantee of its freedom from unwarranted intrusions by, or even intertwining with, the legislative and executive branches.[181]

Unless there are compelling reasons to do things otherwise, therefore, Provincial Court judges' compensation should be determined and provided separately from the usual theatres of government activity. Administrative convenience and routine attempts at economy are not, for us, sufficient reasons to depart from this precept.

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[179] See, e.g., Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1978), 91 Harvard L. Rev. 1212; Brest, "The Conscientious Legislator's Guide to Constitutional Interpretation" (1975), 27 Stanford L. Rev. 585.

[180] The fact that there is a strong tradition restraining governments from using the leverage available to them to influence the outcomes of particular court decisions is another important safeguard of an independent judiciary, but it is not a substitute for more objective conditions or guarantees. See Valente v. The Queen, note 153 above, at 701-702.

[181] The Queen v. Beauregard, note 149 above, per Dickson, C.J.C. at 77.

Several more specific conclusions flow from this conception.

First, we endorse the joint recognition by the Ontario government and the judges' associations that Provincial Court judges' salaries should not be subject, even in principle, to the legislature's annual fiscal appropriations process: they should instead be paid directly from the Consolidated Revenue Fund.[182] We see no good reason, however, for treating the judges' salaries differently from the other components of their compensation regime: it is no less important in principle that those other forms of compensation be insulated from the effects of ordinary government business. Accordingly, **we recommend that all forms of compensation payable out of provincial revenues to Provincial Court judges be paid out of the Consolidated Revenue Fund of Ontario, not out of the legislature's yearly appropriations.**

Second, we accept as sound the agreement of the government and the judges' associations that the salary for Provincial Court judges ought to be legislated, not established by regulation.[183] Such an arrangement has the important advantage of removing the process of actual salary determination from the exclusive discretion of the provincial executive. In our opinion, that advantage outweighs the disadvantage that the process of adjusting those salaries becomes somewhat more time-consuming.

The third consequence of our conception of judicial independence is that Provincial Court judges are not meaningfully comparable with anyone whose salary is paid by the Ontario government and who does not perform a judicial or quasi-judicial function. The fact that provincial civil servants' salaries, pensions or benefits are of a certain cost or value, are administered in particular ways or are subject to certain conditions, for instance, has nothing whatever to do with what compensation Provincial Court judges should receive, and vice versa. There may, of course, be respects or situations in which the compensation provided to judges and government employees will, coincidentally, be similar; all such similarities, though, require independent justification.

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[182] See the text of the July 21, 1987 agreement between the Attorney General and the judges' associations, Appendix C to this report, paragraph 7.

[183] Ibid.

Fourth, the provincial government should be involved only minimally with the administration of the judges' compensation. We see no objection to the government providing clerical or facilitative support, but discretion to approve the requests of individual judges -- for reimbursement of expenses, conditional allowances, specific days or weeks for vacation, leaves of absence with or without pay, or other discretionary benefits -- should lie exclusively with the administrative judges within the Provincial Court. The terms and conditions on which these benefits are made available should not be matters of changeable government policy or practice;[184] they should either be left to the discretion of the Chief Judge or set out clearly, in either statute or regulation. **We recommend that all the benefits, allowances and options to which Provincial Court judges are or may be entitled be codified in statute or in regulation.**

Finally, Provincial Court judges' insurance and benefit arrangements should, as a rule, be separate from those for others on the government payroll, in order that judges not be affected by default by changes in the government's benefits policy toward its public servants; such arrangements should be tailored to the needs and, where possible, the preferences of the judges themselves. Where there is sufficient reason presumptively to group the judges in a coverage cohort with government employees, the judges should be given the option of withdrawing from that cohort and making other arrangements.

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[184] "[E]xecutive control over the terms of service of the judges, such as remuneration, pensions, or travel allowance is inconsistent with the concept of judicial independence": Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges," in Shetreet and Deschenes, ed., Judicial Independence: The Contemporary Debate (1985), 590 at p. 599. See also Deschenes, The Sword and the Scales (1979), at p. 85ff.

We recognize that some of these standards, if implemented, may well result in occasional diminutions in the monetary value of certain of the benefits that Provincial Court judges now receive. We accept this consequence as appropriate. The judges' associations have emphasized both the substance and the symbolism of judicial independence in their submissions. We have taken those submissions seriously. Judicial independence, however, generates other costs of its own. It is only reasonable that the judges themselves bear their fair share of those costs.

b. The Consequences for Salary and Pension Determination

We agree with the submission of the government of Ontario that respect for judicial independence does not, as a matter of course, "provide a rationale for recommending substantial salary increases to Provincial Judges";[185] there is no necessary correlation between independence and superabundance. We disagree, however, with the government's contentions that judicial independence therefore has "little bearing on the . . . quantum of the remuneration of Provincial Judges"[186] and that any relationship between independence and the amount of judicial salaries is only negative.[187] In our view there are three specific ways in which judicial independence ought to influence the salaries of Provincial Court judges.

First, it is widely accepted that governments may not reduce the salaries of sitting judges, individually or collectively, without infringing the principle of judicial independence.[188] As

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[185] Final Submission to the Ontario Provincial Courts Committee, note 140 above, at pp. 14-15.

[186] See quotation at note 164 above.

[187] See quotation at note 165, above.

[188] See, for example, Article 26 of the Syracuse Draft Principles on the Independence of the Judiciary, May 1981:

> Judges should receive, at regular intervals, remuneration for their services at a rate which is commensurate with

the English High Court judges observed in response to an executive order reducing their salaries by 20% in 1931,

> [i]t cannot be wise to expose judges of the High Court to the suggestion, however malevolent and ill-founded, that if their decisions are favourable to the Crown in revenue and other cases, their salaries may be raised and if unfavourable may be diminished.[189]

The reason salary reductions are perceived as an infringement on a judge's independence, however, is not because of the talismanic significance of particular salary amounts but because such reductions erode the judge's financial position relative to the rest of the economy. It does not take the threat of a trip to the poorhouse for a judge to experience some such erosion; all it takes is a disruption of his or her reasonable financial expectations. What matters most, in other words, is the reduction in the purchasing power of the judge's salary.

In times of inflation, however, a judge's purchasing power can be diminished without reducing the actual number of salary dollars; if their salaries fail to increase as rapidly as prices do, judges can no longer afford the same range of goods and services as before. As a result,

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> their status, and not diminished during their continuance in office. After retirement they should receive a pension enabling them to live independently and in accordance with their status.
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> [Note: . . . An exception to the principle of non-reduction of salaries may be made at a time of economic difficulty if there is a general reduction of public service salaries, and members of the judiciary are treated equally.]

Emphasis added. The Syracuse Draft Principles are set out in full in Shetreet and Deschenes, note 184 above, at pp. 414-421.

[189] Confidential memorandum to the Prime Minister, December 4, 1931, reproduced at (1933), 176 Law Times 103, and quoted in Lederman, note 148 above, at p. 129.

> Financial interference with judges can be done by simply omitting to adjust the judicial salaries to price increases. . . . Given the impact of inflation, and the fact that today . . . judges pay income tax, the end result is the decline in the status of the judiciary and serious interference with judicial independence.[190]

In recognition of the fact that governments, in times of inflation, can exert leverage by omission on the judges they pay, the Universal Declaration on the Independence of Justice provides, at paragraph 2.21(b),

> The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.[191]

(Emphasis added.)

It seems to us to follow, therefore, that our recommendations with respect to Provincial Court judges' salaries ought to recognize and preserve the purchasing power that those judges' salaries had in earlier years, unless there is clear and convincing evidence of extenuating circumstances.[192] This, we believe, is especially so in view of the other two ways in which concern for judicial independence ought to affect the salary determination.

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[190] Shetreet, note 184 above, at p. 608. See also ibid., at 628-629.

[191] Quoted with approval in The Queen v. Beauregard, note 149 above, at 75. The text of the Universal Declaration on the Independence of Justice is set out in full in Shetreet and Deschenes, note 184 above, at pp. 447-461. Note that paragraph 2.21(c) provides that "[j]udicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure." Compare paragraphs 14-15 of the International Bar Association Code of Minimum Standards of Judicial Independence, New Delhi, 1982, reproduced in Shetreet and Deschenes, note 184 above, at pp. 388-392.

[192] It also follows that there should be some mechanism for increasing judges' salaries automatically, between the occasions for regular review and legislative change. The July 21, 1987 agreement between the government and the judges' associations

Second, it is an emblem of a judge's independence that he or she be perceived by those within the larger community to be a person of means commensurate with his or her office. If a judge is perceived to be in straitened or reduced circumstances, he or she is more likely to appear to the public to be susceptible to financial pressure or influence, whether or not that really is the case. Preservation of the status that people expect of judges requires that a certain level of expenditure be maintained. Judges, therefore, have somewhat less flexibility than others with similar incomes in the manner in which they respond to increasing prices of goods and services. This fact, in our view, deserves some weight in considering what salaries are appropriate.

Finally, those who come to the bench from private practice incur a significant one-time income tax liability because the canons of independence require that they liquidate their interest in their law partnership upon taking office.[193]

These circumstances affect in two ways the principles of salary determination: they require that the salary be high enough to suffice as the judge's sole source of income, even as the cost of living increases, and they alter significantly the kinds of comparisons one can make between the salaries of judges and those of other groups.

(Appendix C to this report) instructs us (at paragraph 8) to recommend a formula for automatic increases.

[193] The Report and Recommendations of the 1986 Commission on Judges' Salaries and Benefits, February 27, 1987 ["the Guthrie Report"] discusses the income tax consequences of accepting a federal judicial appointment at pp. 26-29, 41-45. The same tax liabilities attach to a provincial judicial appointment.

B. TREAT PROFESSIONALS AS PROFESSIONALS

Much of what we have already said about judicial independence is aptly summarized in the following classic passage from R. McGregor Dawson:

> The judge must be made independent of most of the restraints, checks and punishments which are usually called into play against other public officials. . . . Such independence is unquestionably dangerous, and if this freedom and power were indiscriminately granted the results would certainly prove to be disastrous. The desired protection is found by picking with especial care the men [sic] who are to be entrusted with these responsibilities, and then paradoxically heaping more privileges upon them to stimulate their sense of moral responsibility, which is called in as a substitute for the political responsibility which has been removed. The judge is placed in a position where he has nothing to lose by doing what is right and little to gain by doing what is wrong; and there is therefore every reason to hope that his best efforts will be devoted to the conscientious performance of his duty.[194]

Our second principle, that judges will behave in a professional manner if they are treated professionally, flows almost immediately from this passage.

We mention this in part because a number of those who made submissions to us dwelt upon the volatile issue of courtroom sitting hours,[195] or, as some would prefer to call it, judicial productivity. Among the many statistics the Ministry of the Attorney General compiles with respect to the administration of Ontario courts are measurements of courtroom utilization: the number of hours per day each courtroom is in use; the number of judge hours represented by those hours of use, and the average number of hours per day that the judges spend presiding in courtrooms. These statistics ordinarily are not released to the public. In response to this Committee's inquiry about why these records are kept, the Ontario government said that it was

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[194] Dawson, The Government of Canada (2d ed., 1954), at p. 486, quoted in Lederman, note 148 above, at 172-173.

[195] See, e.g., the Toronto Star editorial "Scott vs. Judges," August 15, 1988 and the Attorney General's letter of reply, August 20, 1988.

> in order to allow the Ministry of the Attorney General to measure courtroom utilization in Ontario and to take steps, where possible and necessary, to improve the efficiency of courtroom utilization in particular locations and/or to construct new courtrooms.[196]

The government also provided us with statistics, summarized by judicial district, of the gross courtroom sitting hours[197] and average daily sitting hours of the judges of the Provincial Court (Criminal Division),[198] the District Court and the Supreme Court of Ontario for the year 1986-87.

No one before us disputed the legitimacy of keeping statistical records for the purposes the government indicated. The controversy arose because of the inference some are said to draw from these figures about how hard Provincial Court judges work.

The submissions of the Ontario government to this Committee carefully avoided drawing this inference; they were, however, careful to call to our attention the following observations in the Zuber Report on the subject:

> This Inquiry received a surprising number of complaints from lawyers, administrators and members of the public about the lack of industry on the part of judges in the

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[196] Reply Submissions to the Ontario Provincial Courts Committee, note 164 above, at p. 42.

[197] "Gross courtroom sitting hours" represent the total number of hours a courtroom was in use, including breaks and recesses but excluding time for lunch.

[198] It is curious that the government did not give us average daily sitting hour statistics for the judges of the Civil or Family Divisions of the Provincial Court.

> Provincial and District Courts. The complaints were anecdotal in nature, but they were made with sufficient frequency and vehemence that the Inquiry considered it necessary to attempt some empirical verification. To do this, we adopted the same approach as a certain Ontario cabinet minister, who made unannounced afternoon visits to court facilities. Our observations verified the complaints received, in that some Provincial and District Courts rarely sit past 3 p.m., and some of them do not sit in the afternoon at all.
>
> In addition, such statistical information as is available . . . indicates that the average sitting day for provincial judges is only three hours -- and this does not include days on which a judge is not scheduled to sit, but rather comprises only the days on which sittings are actually scheduled.[199]

Even after he allowed for the fact that judges have duties outside the courtroom, Mr. Justice Zuber concluded that "an average sitting day of only three hours is unacceptably low,"[200] and recommended five hours as an appropriate normal sitting day for Provincial Court judges.[201]

The government also took pains to emphasize that it was not suggesting that courtroom sitting hours should be a factor in shaping our recommendations. It did, however, adjure us expressly in its final submission that "[t]he failure, or apparent failure, of the [Provincial Courts] Committee to deal with sitting hours may well be a matter of concern to the members of the [legislature's] Standing Committee [on the Administration of Justice[202]] of sufficient significance to affect the weight given to the Committee's recommendations."[203] Dutifully, then, we turn to consider the issue.

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[199] Zuber Report, note 5 above, at p. 169.

[200] Ibid., at p. 170.

[201] Ibid., at p. 171.

[202] This is the legislative committee to which, by agreement, the present report is to be referred for official consideration. See Appendix C to this report, at paragraph 6.

In the first place, we think it would be a mistake for anyone to rely at present on courtroom sitting hour statistics as a meaningful measure of the nature or the amount of work Provincial Court judges do. There is simply too little trustworthy information on which to base an appraisal of those numbers' real significance. Many of the judges and lawyers who made submissions to us reminded us of the range of tasks outside the courtroom that are integral parts of the work of judging: reading and researching the law on a regular basis; dealing in chambers with preliminary and procedural matters; writing occasional reasons for judgment; travelling to and from remote communities. Because of the growing difficulty introduced into Provincial Court matters by the Charter of Rights, the Young Offenders Act and ever more complex provincial and federal regulatory legislation, judges, according to these informants, are having to spend increasing amounts of time on research and preparation outside the courtroom. None of these efforts registers affirmatively in records based on courtroom sitting hours, yet all of them are more or less indispensable. Finally, there are any number of circumstances beyond the control of particular judges that affect the length of time it takes to complete a day's docket of cases. Counsel may be ill, unprepared or unavailable; witnesses or accused may fail to appear; unforeseen complications may necessitate adjournments; cases may settle. Only some of these circumstances, perhaps, could be accounted for or avoided by more effective scheduling.

All these factors, and no doubt more, have the potential to deflect any inference one might draw from a judge's average sitting hours about his or her performance or productivity. We are in no position to say, on the basis of the largely anecdotal submissions we received, to what extent each or all of these considerations actually do affect the course of a judge's work day, let alone the composite work product of the entire Provincial Court. In the absence of clearly established correlations between a judge's sitting hours and his or her actual workload, it would, in our view, be imprudent to assume that the one is representative of the other.

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[203] Final Submission to the Ontario Provincial Courts Committee, note 140 above, at p. 19.

The "sitting hours" controversy has convinced us of the importance of affirming that Provincial Court judges are professionals. That affirmation compels one to accept that each of them came to the bench with a clear appreciation of the fundamental importance of the work the Provincial Court does and with a developed disposition to fulfill his or her functions well and conscientiously.

This principle has certain implications for the design, administration and content of a remuneration regime for the Provincial Court judges. Some of these deserve independent comment.

First, the remuneration that judges receive has to be sufficiently generous, and be perceived by both the judges and the public to be sufficiently generous, to signify materially the public's awareness of the importance of the functions of the provincial judiciary and its respect for the qualifications and the expertise of the judges themselves. Meeting this requirement may occasion some small measure of financial discomfort for the provincial government. Such discomfort should be tolerated; it is, after all, a measure of the significance the province ascribes to the Provincial Courts' contribution to the justice system.

Second, the judges' working year should be structured to recognize that quality work takes time. Judges should have sufficient opportunities for research and reflection. Because of the parallel principle of judicial independence, such opportunities ought ordinarily to be allocated by the senior provincial judiciary, not by officials in the provincial government.

C. THE TOTAL COMPENSATION PRINCIPLE

Our final general principle is one that the Ontario government brought to our attention. In its final submission, the government encouraged us to "consider the compensation package under negotiation or discussion as a whole,"[204] as is the practice of interest arbitrators, in order to keep firmly in mind the aggregate cost of the improvements we might choose to recommend. This, to us, is common sense. Not only should our package of recommendations be credible financially, it should also make sense as a whole.

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[204] Ibid., at p. 7.

We have sought in this report to design a compensation scheme that satisfies these requirements. The fact that we have done so, however, has implications for the manner in which our recommendations ought to be received and implemented. Because we have designed our set of recommendations to make sense as a whole, we believe that it ought to be implemented as a whole.

IV. SPECIFIC RECOMMENDATIONS

A. SALARY

1. The Question of Parity with the District Court Judges

Of all the occupational issues that have concerned Provincial Court judges, the most important is the question of salary. Of all the salary issues that have surfaced since the inception of the Provincial Court in Ontario, the oldest and most contentious is the question of parity with the judges of the District Court. For that reason, we begin our consideration of salary by dealing with the parity issue.

The claim for salary parity has respectable antecedents and a broad base of current support. As long ago as 1968, in the report that led to the establishment of the Provincial Court, Chief Justice McRuer recommended that magistrates and judges of the juvenile and family courts be paid the same salary as the county court judges.[205] In that same year, the Attorney General of the day, the Honourable Arthur Wishart, said in the course of the legislative debates on the first Provincial Courts Act that the new Provincial Court might well become comparable in stature with the County and District Courts because "the salary level is going to be the same."[206] And early in 1981 the first Provincial Courts Committee recommended unanimously that "equality of remuneration between the provincial court judges and the county court judges" be achieved by April 1, 1985.[207] In the proceedings before our Committee, more than a quarter of all submissions -- a greater number than favoured any other single position -- urged us to recommend that Provincial Court judges be paid as much as, or more than, the District Court judges.

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[205] McRuer Report, note 3 above, at pp. 529, 543-544, 570.

[206] Hansard, May 22, 1968, p. 3255.

[207] Report of the Ontario Provincial Courts Committee, January 30, 1981, p. 2.

Others proposed that we recommend a salary structure stated either as a percentage of, or as a dollar differential from, whatever salary is paid to the District Court judges. Considerably more than half of those who made submissions to us emphasized the unfairness of the current salary disparity between the two groups of judges.

The contrary view has had support as well. Writing in 1973, the Ontario Law Reform Commission said that the salaries Provincial Court judges were then receiving were inappropriately low; it added, however, that it

> [did] not favour adoption of the principle that the salaries of Provincial judges should be automatically equated with those of County Court judges, or indeed any other persons whose salaries are established by another government. While such other salary levels might well provide helpful comparisons, the determination of an appropriate salary level to meet the broad guidelines set out above [in the Commission's report] should be the sole responsibility of the Government of Ontario.[208]

In its submissions to this Committee, the Ontario government has consistently opposed any linkage between the salaries it pays to Provincial Court judges and the salaries the federal government pays to the District Court judges. This stance reflects the position taken by the Honourable Elinor Caplan, then chairman of Management Board of Cabinet, in her statement to the legislature on October 25, 1985. On that occasion, she said

> it is not appropriate to link provincial judicial remuneration with federal judicial remuneration. In our view this automatic linkage would relinquish our responsibilities to the taxpayers of this province by effectively transferring to the federal authorities the power to make decisions in this important area of provincial concern.

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[208] Ontario Law Reform Commission, Report on Administration of Ontario Courts (1973), Part II, p. 11.

> As the elected representatives, we are accountable to the people of Ontario and hence must retain the responsibility and authority for the allocation of our financial resources.[209]

Others who appeared before us also endorsed this view, for these or other reasons.

The judges' associations submitted that the salaries of the District Court judges are "perhaps the most valid comparison to measure Provincial Court Judges['] remuneration,"[210] but never proposed specifically that there be any formal linkage between the salaries paid to the two groups of judges.

In our view the answer to the question of salary parity depends on the answers to three subordinate questions: (a) whether the job of Provincial Court judge, considered strictly as a job, is equivalent -- in the complexity, volume of work and degree of responsibility it involves and in the minimum qualifications one must have in order to do it -- to the job of District Court judge; (b) whether, if so, Provincial Court judges should therefore be paid the same salaries as the District Court judges, and (c) if so, whether there should be explicit, ongoing linkage between Provincial Court judges' salaries and the salaries paid to the District Court judges. We deal with these questions in turn.

For purposes of this report, we are prepared to accept that the work assigned to Provincial Court judges is, on the whole, of equivalent responsibility, volume and complexity to that assigned to those on the District Court. The volume of cases Provincial Court judges have to deal with is more than three times as great as the volume imposed on the District Court;[211] very serious cases and cases with complex facts or law seem prima facie no less likely to arise before the one bench than before the other.[212] We recognize that the District Court outranks the Provincial Court in the hierarchy and hears appeals from Provincial Court decisions in certain situations.[213] The minimum qualifications for the two benches, however, are now identical.[214] For these reasons, we consider the salaries of District Court judges a useful comparison.

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[209] Statement to the Legislature by the Honourable Elinor Caplan, note 85 above, at p. 3.

[210] Reply of the Provincial Court Judges of Ontario to the Submission of the Government of Ontario, June 17, 1988, p. 24.

[211] See note 1, above.

The next step in the argument is the one we cannot take. Even assuming the duties assigned to the two courts are equivalent, it does not follow that Provincial Court judges ought to receive the same amounts as the federal government now pays the District Court judges. Neither does it follow that Provincial Court judges' salaries ought to be expressed as a function of the salaries of District Court judges. We have reached these conclusions for three reasons.

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[212] Few proceedings, for example, have more complex facts or law than prosecutions under the Environmental Protection Act, R.S.O. 1980, c. 141, as amended. Such prosecutions are within the exclusive jurisdiction of the Provincial Offences Court, presided over by Provincial Court judges and justices of the peace. And no proceedings, perhaps, are more serious than prosecutions for murder. Because the offence of murder (Criminal Code, s. 218) is listed among the offences in s. 427 of the Criminal Code, only judges of the superior courts may preside at trials of adults for murder; neither the Provincial Court nor the District Court has any jurisdiction. Because the Criminal and Family Divisions of the Provincial Court are Ontario's youth courts for the purposes of the Young Offenders Act, however (see Courts of Justice Act, 1984, ss. 67(2), 75(1)(b), respectively), they have exclusive jurisdiction over proceedings against accused who are 12 through 17 years of age: including prosecutions in youth court for murder.

[213] See, e.g., Courts of Justice Act, 1984, s. 75a; Provincial Offences Act, R.S.O. 1980, as amended, s. 99(2)(b). When District Court judges preside in provincial offences court as justices of the peace, however, their decisions are subject to appeal to the Provincial Court (Criminal Division): see R. v. Valente (1982), 39 O.R. (2d) 413 (H.C.J.).

[214] Compare Courts of Justice Act, 1984, s. 52(2) with Judges Act, s. 3.

First, we cannot accept that if the two groups deserve the same salary, the salary they deserve is the one that the higher paid group is now receiving; that position needs independent support. This Committee, however, has been given neither the information nor the authority to satisfy itself that the judges of the District Court are at present being paid appropriately: for all we know, it may be that they are paid too much or too little. The salary District Court judges receive cannot, therefore, be binding on a salary recommendation that comes from us.

Second, we cannot ignore the fact that the two groups of judges are paid by different levels of government and that those levels of government have different powers and responsibilities. Unlike the federal government, which pays the District Court judges, the government of Ontario does not have plenary powers of taxation and has no authority to regulate interest rates or the money supply.[215] These distinctions alone would suffice to justify Ontario in having different fiscal priorities from those of the federal government and in being somewhat more cautious about expenditures generally. In addition, federal and provincial governments are accountable independently to their electorates. As a result, judicial remuneration scales that may be in order for one level of government may be thought to be inappropriate for the other. Any salary recommendations for judges paid by Ontario have, therefore, to reflect the conditions that obtain in Ontario. To that extent we agree with the Ontario government and with the Ontario Law Reform Commission.

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[215] Section 91 of the Constitution Act, 1867 gives the federal government exclusive legislative jurisdiction over currency and coinage (paragraph 14), the issue of paper money (paragraph 15), interest and legal tender (paragraphs 19 and 20), and authorizes it to raise money by borrowing on the public credit (paragraph 4) or by any mode or system of taxation (paragraph 3). The provinces' much narrower powers of borrowing and taxation are conferred by paragraphs 2 and 3 of s. 92.

Finally, the Zuber Report[216] has recommended the abolition by attrition of the District Court in Ontario.[217] To our knowledge, neither level of government has yet responded in public to this recommendation. Implementation of it, however, might well have unforeseeable impacts on the salaries paid to the remaining District Court judges: impacts that no one would consider suitable for Provincial Court judges' salaries. Given the uncertainty that now surrounds this recommendation and the magnitude of the possible consequences of its acceptance, we think it would be imprudent for this Committee in this report to recommend any linkage between the salaries of the Provincial and the District Court judges.

2. Other Salary Determinants

We turn, then, to other factors proposed for our consideration in reaching a salary recommendation for the Provincial Court judges.

We have given little weight to the salaries Provincial Court judges receive in other Canadian jurisdictions. We lack the information and the authority to ascertain whether the salaries those judges receive are appropriate. Even if we were to assume that the judges in the other jurisdictions are being properly paid, we could not simply apply those figures to judges in Ontario. For any such comparison to have a sound basis, it would have to take into account the particular ways in which the situation here resembles and differs from the situations elsewhere: the differences in substantive and monetary jurisdiction among the various provincial and territorial courts; the differences in minimum qualifications for appointment; the differences in the numbers of provincial judges per capita; the differences in the size and nature of the geographical areas that the judges must serve, and the differences in the economic conditions and prospects from place to place. Based on the limited information we have received on these matters, we do not think the comparison can usefully be pursued.

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[216] Note 5 above.

[217] Ibid., esp. at pp. 110-112.

We agree with both the Ontario government and the judges' associations that the compensation arrangements for provincial deputy ministers ought not to influence heavily the compensation awarded Provincial Court judges. Wholly different imperatives govern the salaries appropriate to each. Deputy ministers are primarily managers, who ensure the prompt, efficient realization of government policy. In paying them it is appropriate to provide wide salary ranges and payment based on performance. The function of a Provincial Court judge, however, is neither administrative nor managerial; thus, it is not truly comparable to that of a deputy minister. More important, judges comprise a distinct, third branch of government; their appointment and salary structure must reflect that reality and ensure their insulation from the legislative and executive branches.

By contrast, the level of remuneration paid to the heads of provincially appointed administrative and quasi-judicial tribunals is, in our opinion, useful in considering what Provincial Court judges should be paid. Many Ontario tribunals have duties that are regarded as similar to those of the judges and are bound by similar procedural constraints. In that sense there is ground for comparison. At the same time, however, they are not courts. Neither their members nor their operations require the same degree of separation from the government; unlike judges, tribunal heads and members need not restrict to nearly so great an extent their social and business connections and may re-enter practice or business reasonably readily once a term appointment has concluded. Finally, although the matters assigned to tribunals for disposition are frequently of extremely great importance both in substance and monetarily, they do not rise to quite the same degree of gravity as decisions about the liberty of the subject, the rule of law or the protection and care of children. In our opinion, therefore, Provincial Court judges should, at a minimum, be paid at least as much as the heads of Ontario administrative tribunals.

The factor we have ranked the highest is the one on which the judges' associations have placed the greatest emphasis: the continuing need to attract candidates of the highest quality to the Provincial Court and, once appointed, to stimulate and retain them for the duration of their careers. It is absolutely essential that the salary Provincial Court judges receive be high enough to signify, both to the sitting judges and to potential candidates, that the Ontario government respects and trusts the professionalism and dedication of its judiciary.

To be attractive, the salary need not -- and ought not to-- be excessive.[218] It must, however, be sufficiently generous to offset the financial and social restrictions Provincial Court judges must endure as a cost of ensuring their independence.[219]

We have examined the salary statistics in the studies submitted to us. We have paid particular attention to the reported earnings of partners who have fifteen to twenty years' experience practicing in small and medium-sized firms. Our recommendation establishes a salary structure that we believe will be attractive to better than average lawyers in Ontario who have ten or more years' private practice experience and who are willing to exchange some income for the security of tenure and the honour of a judicial appointment.

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[218] [I]t is neither necessary nor desirable to establish judicial salaries at such a level as to match the judges' earnings before appointment to the bench. The most obvious reason for this is that such a policy would tend to attract people to the bench for purely financial reasons. The sort of person who would accept a position on the bench because it paid well is not the sort of person who would make the best judge. Rather, the sort of person we would wish to see on the bench are those who appreciate the honour of being a judge and who see as part of their reward the satisfaction of serving society on the bench.

The Independence of the Judiciary in Canada. Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada, August 20, 1985, at p. 18.

[219] See pp. 52-56, 69-70, above.

3. Recommended Salaries for April 1, 1987

According to paragraph 7 of the July 21, 1987 agreement between the Attorney General and the judges' associations,[220] the legislation that will follow the recommendations of this Committee will establish Provincial Court judges' salaries as of April 1, 1987. The salaries we are recommending, therefore, are the salaries we believe Provincial Court judges should have been receiving as of that date.

a. Provincial Court Judges

Based upon the factors and the reasoning set out above, **we recommend that Provincial Court judges receive annual salaries, effective April 1, 1987, of:**

$105,000.

b. Provincial Court Judges with Administrative Responsibilities

In Ontario the Provincial Court has a three-stage administrative hierarchy. There are at least eighteen Senior Judges[221] distributed through the court's three divisions; the Criminal and Family Divisions each have Associate Chief Judges, and each division has its own Chief Judge.

The three Chief Judges are ultimately responsible for the administration of the judges within their divisions and for the continuing assessment of the sufficiency of their divisions' resources: courtrooms, chambers and numbers of judges. Each Chief Judge, while continuing to preside in person at cases of special complexity or importance, must arrange the sittings of the court in his or her division and assign particular judges to particular courts on particular days. Chief Judges also must ensure that the judges they supervise are given every opportunity to be current on developments in the law. All three Chief Judges are members of the Judicial Council for Provincial Judges; in that capacity they must advise the government on all prospective appointments to the Provincial Court and deal with complaints made against Provincial Court judges. In addition, the Chief Judge of the Criminal Division serves as Chief Judge of Provincial Offences Court, chairs the Justices of the Peace Review Council and has primary responsibility for educating, and dealing with complaints against, Ontario's justices of the peace. Elsewhere in this report we recommend adding to the Chief Judges' responsibilities, in order to enhance the independence of the Provincial Court.

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[220] Appendix C to this report.

[221] According to the judges' associations, there are eleven judges in the Criminal Division and seven in the Family Division; according to the Ontario government, there are a total of 21 senior judges.

The two Associate Chief Judges assist the Chief Judges in carrying out their functions and, in their absence, have all the powers and duties of the Chief Judges in their divisions. The Associate Chief Judge of the Criminal Division also acts as the Senior Judge for the courtrooms at Old City Hall in Toronto.

The Senior Judges, while carrying full caseloads as Provincial Court judges, administer and fine-tune the arrangements the Chief Judges have made for court assignments and sittings in the geographical regions to which they themselves are assigned, and assist the Chief Judge in the education of the judges and justices of the peace within that region. In cases of illness, conflict of interest or other disruptions in scheduling, it is the Senior Judge in the region who must attempt to make the adjustments. Senior Judges of the Criminal Division also sit as members of the Justices of the Peace Review Council in matters concerning justices of the peace within their regions.

It is common ground that the judges who have these administrative duties deserve additional salary for the added responsibility. At present the three Chief Judges each make $90,565 per year, the two Associate Chief Judges $86,254 and the Senior Judges $83,029, compared with the $81,510 that the rest of the judges receive.[222] These amounts must now be considered. In their submission to us, the administrative judges have asked for significant increases in the differentials between their salaries and the salaries of the other Provincial Court judges, in order to recognize the importance of the extra duties they fulfill and to continue to make those positions attractive to qualified judges.

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[222] Regulation 811, R.R.O. 1980, s. 2, Schedule, as amended by O.Reg. 61/88.

We believe the differential between the Senior Judges and the non-administrative judges of the Provincial Court stands in need of considerable increase, because the Senior Judges' duties are in addition to the full caseloads Provincial Court judges ordinarily carry. In turn, Chief Judges and Associate Chief Judges deserve higher salaries than the salaries received by Senior Judges. **We recommend that administrative judges receive annual salaries, effective April 1, 1987, of:**

Chief Judges	**$120,000**
Associate Chief Judges	**$115,000**
Senior Judges	**$112,000**

4. Automatic Annual Salary Adjustments

In both Valente v. The Queen[223] and The Queen v. Beauregard,[224] the Supreme Court of Canada reaffirmed that financial security is one of the essential conditions of an independent judiciary. As we have stated above,[225] attempts to reduce judges' salaries, individually or collectively, are almost always infringements of judicial independence; in times of inflation, such infringement can result from a government's omission to keep judges' salaries in line with rising prices. **We recommend, therefore, that Provincial Court judges' salaries be adjusted regularly to keep up with inflation.** No doubt in part in recognition of this principle, the judges' associations and the Attorney General agreed on July 21, 1987 that this Committee should recommend a formula "for the provision of salary increases for each year in which the salaries of provincial judges were not raised by legislation."[226]

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[223] Note 153 above, at 704.

[224] Note 149, above, at 74-76.

[225] Pages 67-69, above.

Having rejected formal linkage between Provincial Court judges' salaries and the salaries of other groups, we are left with two apparent standards for use in an adjustment formula: the Consumer Price Index ("CPI"), a monthly measure of the change in the prices of certain frequently purchased consumer goods and services, and the Industrial Aggregate, a monthly registration of the average industrial wage. The judges' associations have urged us to recommend that salaries be adjusted annually in accordance with increases in the Industrial Aggregate; the government of Ontario has asked that we "develop a formula which has a 'made in Ontario' look and which is compatible with the financial outlook and philosophy of the Province of Ontario."[227] Unfortunately, we received no submissions that explained the financial outlook and philosophy of the province. The government did say, however, that "there must be some degree of equity between the annual salary increases for Provincial Judges and the other persons whose salaries are funded by monies appropriated by the Ontario Legislature."[228]

If this last submission is meant to suggest that what happens to Provincial Court judges' salaries from time to time should be correlated with what happens to the salaries of provincial civil servants, we, with the greatest respect, disagree. The constitutional principle of judicial independence imposes clear and firm constraints on governments' discretion to alter or diminish the value of judges' remuneration. Although the government may, if it chooses, give provincial public servants the benefit of whatever arrangements it makes for Provincial Court judges, it should not, as a matter of course, interfere with Provincial Court judges' compensation to bring it into alignment with the compensation regime it applies to its employees. Provincial Court judges, precisely because they are judges, are unique.

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[226] Appendix C to this report, paragraph 8.

[227] Submission to the Provincial Courts Committee, made on behalf of the Government of Ontario, note 144 above, at p. 30.

[228] Ibid., at p. 34.

It is for this very reason that we do not recommend that Provincial Court judges' salaries be indexed to fluctuations in the Industrial Aggregate. To do so would be inconsistent with the emphasis we have placed on the special features that condition judicial remuneration. There is no a priori reason to suppose that the market forces that affect industrial wages in a given year have any legitimate application to the salaries of judges.

Preservation of the purchasing power of judges' salaries is, on the other hand, one of the guarantees of an independent judiciary. At present, the most representative measure of changes in purchasing power in Canada is the CPI. Despite its stated misgivings about the appropriateness of the CPI as a measure of inflation,[229] the Ontario government, even now, thinks highly enough of that index to use it as the foundation for its own indexation of public service pensions.[230] **We recommend that the Courts of Justice Act, 1984 be amended to provide that Provincial Court judges' salaries be adjusted, effective April 1 of every year, in direct proportion to the percentage of any annual increase in the national average of the Consumer Price Index, published by Statistics Canada, from the beginning to the end of the previous calendar year. We recommend further that when and if Statistics Canada regularly publishes Consumer Price Index figures for Ontario, those figures be used instead of the figures for Canada.**

Two final points arise from the Ontario government's initial submission on this issue. First, we do not recommend that any statutory ceiling, in either dollar or percentage form, be imposed on the application of the CPI to adjust Provincial Court judges' salaries. Any such ceiling, when utilized, would prevent the adjustment from accounting fully for price increases; in so doing, it would depart from paragraph 2.21(b) of the Universal Declaration on the Independence of Justice.[231]

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[229] Ibid., at p. 31.

[230] See the Superannuation Adjustment Benefits Act, R.S.O. 1980, c. 490, s. 4.

[231] Quoted in the text at note 191, above.

Second, the government has submitted that

> it would seem inappropriate to propose a formula for increasing Provincial Judges' salaries which could have the effect of exempting Provincial Judges from any . . . constraints which might be imposed in the future on economic adjustments for other persons engaged in public service.[232]

As a general proposition, we disagree with this submission. Although in principle there may be emergencies in which the financial guarantees that help secure judicial independence must bend to satisfy higher imperatives, nowhere has the Ontario government given us a foundation for supposing that any such circumstances can reasonably be expected in the future. In the meantime, such guarantees must not be compromised in order merely to serve a government policy preference. For present purposes, therefore, it suffices that we acknowledge that provincial governments have the constitutional capacity to subject Provincial Court judges' remuneration to laws of general application.[233]

B. PENSION AND RELATED BENEFITS

1. Income Continuity: The Judges' Own Pension

On March 27, 1984 the Provincial Courts Committee released a major report on the subject of pensions for Provincial Court judges. In it, the Committee expressly

> accept[ed], as a matter of principle, that the independence of the judiciary is predicated on an

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[232] Submission to the Provincial Courts Committee Made on Behalf of the Government of Ontario, note 144 above, at p. 30.

[233] Judges v. Attorney-General of Saskatchewan, [1937] 2 D.L.R. 209 (P.C.).

> assurance of adequate salary while in office and, given a system of compulsory retirement, on an assurance of an equitable provision of retirement security.[234]

In that report the Committee set out three important principles that it thought should influence the design of a separate pension plan for Provincial Court judges. First, it recognized that a funded indexed plan for Provincial Court judges would require contribution levels "greatly in excess of [those] required by any other retirement scheme," because of the relatively short duration of most judges' careers on the bench. As a result, it accepted "as a matter of principle that a revised pension plan for provincial court judges can only be actuarially sound if the government underwrites the majority of the costs of the plan."[235] Second, in order to avoid the creation of two classes of judges, the Committee emphasized that its proposal was to

> apply to all judges, regardless of whether they were appointed before or after implementation of the plan and regardless of whether they were covered by the public service plan prior to their appointment to the bench. The contribution level would be the same for all judges. To ensure fairness to the small percentage of existing judges who would receive higher benefits under the existing plan, [the Committee proposed] that judges appointed before implementation of the plan be guaranteed an income continuity payment after retirement of not less than the benefit they would have received under the existing plan, as determined on the date they ceased to hold office.[236]

Finally, the Committee recommended a retirement plan that "would provide approximately seventy-five per cent of pre-retirement income when taxes, O[ld] A[ge] S[ecurity] and C[anada] P[ension] P[lan] are taken into account."[237]

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[234] Report of the Provincial Courts Committee, March 27, 1984, p. 3.

[235] Ibid., at p. 4.

[236] Ibid., at pp. 8-9.

In the details of its proposal, the Committee sought to realize these three objectives, given the salary levels that were then being paid to the judges. By implementing that proposal without significant alteration, the Ontario government signified its implicit acceptance of the soundness of those principles. We have considered these principles in making the recommendations.

a. Description of the Current Provisions

The present retirement income plan for Provincial Court judges has the following features:

i) judges appointed at age 59 or younger are entitled, upon retirement, to an annual income continuity payment payable monthly during their lifetime, provided that by the time they retire, they have met the basic service requirement. To meet the basic service requirement, a judge must be at least 65 years of age and the total of his or her years of age and years of service must equal or exceed 80. Time the judge spends on leave with pay or on long term disability insurance counts toward satisfaction of this requirement;[238]

ii) the amount of the income continuity payment depends on the judge's age when he or she ceases to hold office. A judge who retires at age 65 (having met the basic service requirement) receives payments equalling 45% of the salary being paid to judges of the highest judicial rank held by that judge while in office ("final salary"). That percentage figure increases by 1% of final salary for each year beyond age 65 that the judge remains on the bench full-time,[239] to a maximum of 55% of final salary at age 75;[240]

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[237] Ibid., at p. 8. By coincidence, the American Bar Association standards for evaluating the fringe benefits of state court judges in the United States prescribe that "[j]udges who are at least age 65 with at least 15 years of service [be] eligible to receive a pension equal to 75% of the currently effective salary of the office from which [they] retired" and that "[j]udges . . . not contribute to the judicial retirement fund." See A Survey of State Judicial Fringe Benefits, American Bar Association, Judicial Administration Division, March 1988, pp. 2-3.

[238] O.Reg. 332/84, as amended, ss. 1(b), 2(1), 3, 7(b),(c), 20.

iii) the preceding rules do not apply to judges appointed at age 60 or later. Judges appointed at age 65 or older have no pension entitlement. Judges appointed at ages 60 through 64 qualify for annual income continuity payments by remaining in office until the age of 70. Time spent on leave with pay or on long term disability insurance counts toward satisfaction of this requirement. The income continuity payments payable to judges who qualify depend on the age of appointment and the age at which they leave office. Judges appointed at age 60 who serve until age 70 receive payments equalling 45% of their final salary as full-time judges; that percentage reduces by 5% of final salary for each year over 60 that the judge is when appointed, to a minimum of 25% of final salary for judges appointed at age 64. These amounts are increased by 1% of final salary for each year past the age of 70 that the judge has served full-time when he or she leaves office;[241]

iv) judges who reach age 65, who have at least five years of full-time service at the time they leave office and who leave office because of injury or chronic sickness are entitled to whatever income continuity payment they would have earned by staying in office full-time until age 75;[242]

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[239] Reduced judicial service after age 65 counts as full-time service for this purpose if the Chief Judge certifies to the Provincial Judges Benefits Board that the reduced service is equivalent to approximately 50% or more of full-time service: O.Reg. 332/84, s. 7(a).

[240] O.Reg. 332/84, as amended, ss. 2(2),(3), Table 1.

[241] O.Reg. 332/84, as amended, s. 4. Reduced service certified equivalent to 50% or more of full-time service counts as full-time service for purposes of earning the 1% annual increments: s. 4(5)(a).

v) judges aged 65 or older who are refused the Chief Judge's approval to remain in office are entitled to whatever income continuity payment they would have earned by staying in office full-time until age 75, if the Judicial Council for Provincial Judges determines that the Chief Judge's approval should not have been refused;[243]

vi) judges who complete fifteen years of service before age 65 may leave office early and begin to collect at age 65 the income continuity payments they could have claimed by staying in office until that age. For judges who elect to begin collecting income continuity payments sooner, the amount of the payment is actuarially reduced by 5% for each year of age less than 65 the judge has reached when the payments commence;[244]

vii) judges who were appointed before July 1, 1984 and who remain in office after July 1, 1984 are entitled, assuming they meet the appropriate requirements, to an income continuity payment calculated either in accordance with the above rules or in accordance with the quantum and eligibility rules in the PSSA, whichever produces the greater amount on the day the judge leaves office;[245]

viii) judges who retired on or after October 1, 1979 but before July 1, 1984 are entitled, assuming they met the appropriate requirements when they left office, to an income continuity payment calculated either in accordance with the above rules or in accordance with the quantum and eligibility rules in the PSSA, whichever produced the greater amount as of July 1, 1984;[246]

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[242] O.Reg. 332/84, as amended, s. 5.

[243] O.Reg. 332/84, as amended, s. 6.

[244] O.Reg. 332/84, as amended, s. 9.

[245] O.Reg. 332/84, as amended, ss. 40, 42. The PSSA eligibility rules are set out in the text accompanying note 77, above.

ix) all the income continuity payments mentioned above are increased in accordance with increases in the salaries of sitting Provincial Court judges[247] and are in addition to any benefits the judge may receive under Old Age Security or the Canada Pension Plan;

x) judges who left office before October 1, 1979 retain whatever pension entitlement they had by virtue of their participation in the plan prescribed by the PSSA; in addition, if they met the basic service requirement at the time they left office, they are entitled to a supplementary allowance that brings their total pension up to 45% of their last regular salary as a full-time judge. This allowance, like the pension payable under the PSSA, is indexed pursuant to the provisions of the Superannuation Adjustment Benefits Act.[248]

b. Recommendations

We propose no changes in the structure of the current pension plan; none of the submissions we received complained seriously about it. There are, however, some respects in which the retirement income scheme needs improvement.

The plan no longer satisfies the target income replacement ratio -- 75% of pre-retirement after-tax income, including Old Age Security and the Canada Pension Plan -- that our predecessor Committee recommended in 1984 and that the Ontario government implicitly accepted as appropriate. Provincial Court judges' salaries have risen since early 1984; as a result, the actual dollar difference has grown between the amount represented by 45% (or even 55%) of a judge's final salary and the amount represented by 75% of his or her after-tax income. The higher the judges' salaries go, the greater this dollar difference will become. Increases in Canada Pension Plan and Old Age Security benefits have not sufficed to make up this difference; given the purposes and the design of those two programs, they cannot be expected to do so in future.

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[246] O.Reg. 332/84, as amended, ss. 43, 43a, 43b.

[247] O.Reg. 332/84, as amended, s. 10.

[248] O.Reg. 332/84, as amended, s. 45; Superannuation Adjustment Benefits Act, R.S.O. 1980, c. 490.

Further, it is increasingly common for the pension plans in both the public and the private sectors to pay retiring long-term employees 65% to 70% of their best five year average earnings. That being so, a basic pension of 45% of final salary can no longer be justified for Provincial Court judges.

Accordingly, **we recommend that the basic percentage used to calculate Provincial Court judges' income continuity payments be increased, throughout the current plan and effective April 1, 1987, by 10% of the salary earned at the time a judge retires by judges of the highest judicial rank he or she held while in office.** That would mean, for example, that a judge who has met the basic service requirement and leaves office at age 65 would receive 55%, instead of the current 45%, of final salary. Similarly, a judge appointed at age 64 who retires at age 70 would receive, under our proposal, an income continuity payment based on 35%, instead of 25%, of his or her final full-time salary. The 1% increments that now apply to judges who stay in office beyond age 65 and leave office having met the basic service requirement, and to judges appointed at age 60 or over who stay in office after turning 70, would remain in place and be added to the new, higher, base figure. Similarly, the 5% actuarial reduction that now applies to the pension entitlements of judges who choose to leave office -- and collect pension --early would continue; it would, however, be applied to an amount computed with reference to the 55% base figure. We were not persuaded by the judges' associations that the actuarial reduction for early retirement should be reduced from 5% to 2.5% per year.

Next, it is our opinion that the present plan has an unfair impact on judges appointed early in life who reach the minimum age of retirement after many years of service. At present those judges earn no additional pension credit for any years of service beyond the fifteenth year;[249] their basic entitlement percentage remains the same (until they reach age 66) no matter how many years in excess of fifteen they serve as judges. To the extent that potential pension benefits colour lawyers' decisions to seek judicial office, the current scheme is a disincentive for anyone to accept an appointment before the age of 50.

In our view the retirement plan should be amended to give some recognition to those additional years of judicial service. **We recommend, therefore, that the income continuity payment payable to a judge appointed before the age of 50 be increased, effective April 1, 1987, by 0.5% of final salary for each year of service beyond the fifteenth that the judge completes before reaching age 65. Such credit should also be given to judges who leave office before age 65 with more than 15 years of service, whether they take an immediate or a deferred pension. With respect to judges appointed before July 1, 1984, we recommend that the entire period of contributory service that stands to their credit in the Provincial Judges Benefits Fund by reason of unrefunded contributions made by them or on their behalf to the Public Service Superannuation Fund (or transferred into that Fund from another) before July 1, 1984 be treated as judicial service for purposes of this enhancement provision, whether or not the contributions were made in respect of judicial service.**

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[249] For judges appointed before July 1, 1984, this statement is not, strictly speaking true. Those judges are entitled to an income continuity payment based either on the rules set out in the judges benefits regulation, O.Reg. 332/84, as amended, or on the rules set out in the PSSA. The PSSA entitlement rule is 2% of the contributor's best five year average salary, multiplied by the number of years of service, to a maximum of 35 years (or 70%). These judges, therefore, do get some credit for years of service beyond the fifteenth in the current arrangement, but only after their quantum of pension under PSSA rules exceeds the amount they would receive according to the calculation under the current plan. According to actuarial evidence presented by the judges' associations, the break-even point at present is about 23.75 years of service; others have suggested it may be higher. Assuming that estimate is correct, the judges in this group get no additional pension benefit for those years of service between their fifteenth and their twenty-fourth.

An example may help illustrate how these recommendations fit together. Imagine a judge appointed to the Provincial Court at age 45 who remains on the bench until her 65th birthday. Because she meets the basic service requirement when she leaves office, our proposal would entitle her to a basic pension of 55% of her final full-time salary.[250] Because she was appointed before the age of 50, however, that percentage would increase by 2.5% (five years x 0.5%). Her income continuity payment, therefore, would be 57.5% of her final full-time salary. If that same judge remained in office until age 72, her income continuity payment would be 64.5% of her final salary: 57.5% + 1% for each year of service beyond age 65.

2. The Survivor Benefits Package

At present the survivor benefits package has two components: life insurance and a survivor allowance. All Provincial Court judges carry group life insurance coverage equal to five times their annual salary until they reach the age of 70, cease to hold office or meet the basic service requirement, whichever comes first.[251] After the earliest of those events occurs, the coverage reduces to $2000 until the judge leaves office; once the judge has left office, it reduces further to $1750 on the next October 1 and to $1500 on the October 1 after that. It remains at $1500 thereafter.[252] For judges who have satisfied the basic service requirement or reached the age of 70, therefore, the automatic life insurance coverage is minimal, whether or not they continue to serve as judges.

It is the survivor allowance that is intended to provide for the families of judges who have left office or met the basic service requirement. The spouse of a judge who dies in office after meeting the basic service requirement is, under current regulations, entitled to an allowance equal to 50% of the income continuity payment the judge would have earned by staying in office until age 75.[253] The spouse of a judge who dies while receiving income continuity payments or after leaving office and while entitled to receive such payments receives an allowance equal to 50% of the judge's income continuity payment entitlement.[254] If the judge dies before the age of 65 and is either entitled to, or is receiving, an income continuity payment, the spouse's allowance is calculated as if the judge had reached the age of 65 before dying.[255] Where there is no surviving spouse, or where the surviving spouse dies while in receipt of a survivor allowance, any children of the judge who are under the age of 18 (or 25, if still in school) share the allowance that was, or would have been, payable to the spouse.[256] When there is no one eligible to receive a survivor allowance, the judge's contributions to the cost of survivor allowance are refunded, with interest, to the judge's estate.[257] Survivor allowance payments are indexed annually to inflation, subject to the rules set out in the Superannuation Adjustment Benefits Act.[258]

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[250] Assuming, for the sake of simplicity, that she had never served as a Senior, Associate Chief or Chief Judge.

[251] O.Reg. 332/84, as amended, ss. 31(1), (2).

[252] O.Reg. 332/84, as amended, s. 31a.

No one may benefit both from a survivor allowance and from the unreduced group life insurance coverage.[259] And no spouse and no child of a spouse may benefit from the survivor allowance if the judge had left office by the time the spousal attachment crystallized.[260]

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[253] O.Reg. 332/84, as amended, s. 11.

[254] O.Reg. 332/84, as amended, ss. 12(1), (2).

[255] O.Reg. 332/84, as amended, ss. 12(3), (4).

[256] O.Reg. 332/84, as amended, ss. 14-15, 17.

[257] O.Reg. 332/84, as amended, ss. 25, 39. Once all the survivor allowances that are payable with respect to a judge have been paid, the estate is entitled to a refund, with interest, of any surplus survivor allowance contributions. In that case, any contributions the judge may have made to the Public Service Superannuation Fund (and had transferred into the Provincial Judges Benefits Fund as of July 1, 1984) are also refundable with interest; the refund, however, is discounted by the amounts, with interest, of any income continuity payments the judge may have received while he or she was alive.

[258] O.Reg. 332/84, as amended, s. 16.

We have identified a number of problems with these provisions.

a. The Definition of "Spouse"

According to s. 1(j) of the Provincial Judges Benefits Regulation, the word "'spouse' has the same meaning as in Part II of the Family Law Reform Act." Part II of that statute dealt with support obligations; it defined "spouse" to include unmarried men and women who have cohabited either continuously for at least five years or, if they are the natural parents of a child, in a relationship of some permanence.[261] That definition incorporated by reference the definition of "spouse" in the Family Law Reform Act as a whole; the latter refers to people who are married or who have taken part in good faith in a form of marriage that is void or voidable.[262]

Part II of the Family Law Reform Act is no longer in force. It was repealed by ss. 71(1) and (2) of the Family Law Act, 1986.[263] The definition it contained has been superseded, in family matters at least, by the definition in s. 29 of the Family Law Act.

This fact makes the reference in the judges benefits regulation confusing. It may be that the canons of statutory interpretation deem the regulation to refer now to the definition in s. 29 of the newer statute. Nonetheless, it is preferable that any confusion about the definition of "spouse," for purposes of the Provincial Court judges' pension plan, be eliminated.

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[259] O.Reg. 332/84, as amended, s. 17a.

[260] O.Reg. 332/84, as amended, ss. 12(5), 15(3).

[261] Family Law Reform Act, R.S.O. 1980, c. 152, s. 14(b). The definition also included either of a man or a woman between whom an order for support, alimony or maintenance has been made.

[262] Family Law Reform Act, s. 1(f).

[263] S.O. 1986, c. 4.

We recommend that section 1(j) of the Provincial Judges Benefits Regulation be amended to read as follows: "'spouse' has the same meaning as in Part III of the Family Law Act, 1986." In our view, the newer definition better captures current public policy with respect to the nature of spousal relations in Ontario.

Both of these definitions, however -- the one in the Family Law Reform Act and its successor in the Family Law Act-- allow for the possibility that a judge may have more than one "spouse" at a given time: someone to whom he or she is legally married and one or more others who satisfy the minimum cohabitation conditions. To the best of our knowledge, there is no present mechanism for resolving such disputes when they arise. We believe that some such mechanism is advisable. **We recommend that the Provincial Judges Benefits Board -- the body that now administers the Provincial Court judges' pension scheme -- be given exclusive jurisdiction with respect to all disputes that arise from competing claims to the status of "spouse" for purposes of survivor benefits. We recommend that the Statutory Powers Procedure Act**[264] apply to hearings before the Board with respect to such disputes.

b. Entitlement

Although in most respects the rules for entitlement to survivor benefits are unexceptionable, there are circumstances in which they produce unfair or unsuitable results. We believe these anomalies should be eliminated.

First, the present regime restricts some judges' choice of beneficiary for the group life insurance coverage. According to s. 31(2a) of the regulation,

> The beneficiary of the group life insurance coverage of a judge under this section is the spouse, child or chil-

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[264] R.S.O. 1980, c. 484.

> dren who would have been entitled to a survivor allowance under the Plan if the judge had met the basic service requirement before dying.

Judges with no one who meets this description may designate any person as beneficiary.[265] More than one submission to us claimed that these provisions distinguish unfairly between judges with families and those without families. According to these submissions, all Provincial Court judges should have unrestricted discretion to plan their estates as they wish.

There is some merit in this contention; there is, however, another plausible view. The very existence of a compulsory package of survivor benefits for Provincial Court judges indicates a public interest in providing for judges' families; it probably also reflects the wishes of a majority of judges. The current arrangement ensures that there is some symmetry between the life insurance and the survivor allowance components of the plan: the same people will benefit no matter which component is the source of the payment. Taken to its extreme, the argument that opposes limiting judges' choice of beneficiary also could be used against compulsory survivor allowance contributions. No one was prepared to press the point that far in proceedings before us.

On balance, however, we conclude that the present restriction is excessive. It is reasonable to treat the amount the plan prescribes for survivor allowance as a measure of the annual amount a Provincial Court judge should be required to ensure will be provided for his or her family in case of death. The capital amount generated by life insurance coverage at five times salary, however, will, if prudently invested, generate a stream of income well in excess of even the enhanced survivor allowance benefit we recommend below. We see no compelling reason to require a judge to designate his or her spouse or children as the beneficiaries of the entire group life insurance benefit; it should suffice that the spouse be assured of enough of that capital to obtain a stream of income comparable to that provided by the survivor allowance. We bow to a more careful assessment of the exact percentage of the benefit that would be required to generate that much income, but we suggest as a working assumption that three-fifths of the total compulsory coverage should be enough. **We recommend, therefore, that section 31(2a) of the regulation be amended to permit Provincial Court judges who have spouses and/or children to designate, in their discretion, someone else as beneficiary of up to two-fifths of their compulsory group life insurance coverage. We recommend that the current restriction contained in s. 31(2a) continue to apply with respect to the other three-fifths of the coverage.**

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[265] O.Reg. 332/84, as amended, s. 31(2b).

Second, there is one group of spouses for whom the current arrangement makes insufficient provision. When a judge appointed at or after age 60 dies in office after reaching age 70 without having met the basic service requirement, his or her spouse receives only the very small amount provided by the reduced group life insurance.[266] The spouse does not benefit from the usual group life insurance coverage, because it ceases to have effect the day the judge turns 70.[267] And because the judge has died without meeting the basic service requirement and was neither receiving nor entitled to receive income continuity payments on the day of death,[268] the spouse is not entitled to a survivor allowance. If, however, the judge had left office the day before dying, he or she at the time of death would have been entitled to an income continuity payment[269] and the spouse would have been entitled to a survivor allowance.[270]

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[266] O.Reg. 332/84, as amended, s. 31a. According to s. 25, the judge's estate receives a refund, with interest, of his or her survivor allowance contributions. If he or she was appointed before July 1, 1984, the estate is also entitled to receive a refund, with interest, of any unrefunded contributions he or she made to the Public Service Superannuation Fund, less the amount, with interest, of any income continuity payments the judge received before he or she died.

[267] O.Reg. 332/84, as amended, s. 31(2).

[268] According to s. 4(1) of O.Reg. 332/84, a judge appointed at or after the age of 60 is entitled to income continuity payments only "upon ceasing to hold office."

[269] O.Reg. 332/84, as amended, s. 4.

[270] O.Reg. 332/84, as amended, ss. 12(1), (2).

There is no reason why these spouses' entitlements should turn entirely on such contingencies. The judges who die in these circumstances are no differently situated from the judges who die in office having met the basic service requirement. **We recommend therefore, that s. 11(1) of O.Reg. 332/84 be amended to read:**

> **The spouse of a judge who**
>
> > **(a) dies while in office, and**
> >
> > **(b) would have been entitled to an annual income continuity payment if he or she had ceased to hold office before dying,**
>
> **is entitled to an annual survivor allowance during the spouse's lifetime.**

The final entitlement anomaly is somewhat different. Section 41(1) of O.Reg. 332/84 permits those judges who retired from full-time judicial service between October 1, 1979 and July 1, 1984, and who were reappointed on a part-time basis before the latter date, to continue to serve on a per diem basis and simultaneously to receive an annual income continuity payment equivalent to the pension they would already have been receiving under the PSSA. Section 41(2) of the regulation makes it clear that these judges, while serving part-time, are not treated as having ceased to hold office. There are at present two judges, both in the Criminal Division, who meet this description.

When such judges die in office leaving eligible survivors, those survivors are, without doubt, entitled to the survivor allowance; the question is how the amount of that allowance is to be computed. According to s. 11 of the regulation, the spouse of a judge who dies in office having met the basic service requirement is entitled to an allowance that equals half of the income continuity payment the judge would have received if he or she had continued in office full-time until age 75. According to ss. 12(1)(a) and 12(2), however, the spouses of judges who die while receiving an income continuity payment are entitled to an allowance equal to one-half of the judge's income continuity payment. Spouses of the judges now sitting part-time while receiving income continuity payments may well satisfy the requirements for both allowances. Nowhere does the regulation specify what happens to such spouses: whether they receive two allowances or only one,[271] and if only one allowance, which one. There is no reason to suppose that the two different survivor allowance calculation methods would generate the same allowance amount.

We recommend that O.Reg. 332/84 be amended to make it clear that no one may receive more than one survivor allowance in respect of the same judge. We recommend further that the spouse of a judge who dies while serving part-time on a per diem basis receive a survivor allowance calculated on the basis of the annual income continuity payment the judge became entitled to on retirement from full-time service (s. 11 of the regulation), not on the basis of the amounts the judge would have received had he or she served full-time until age 75 (section 12 of the regulation). Judges serving in this capacity should be regarded, for purposes of the survivor allowance, as retired judges who have ceased to hold office.

c. Amount of the Survivor Allowance

As mentioned above, the survivor allowance judges' spouses now receive is, depending on the circumstances, either 50% of the income continuity payment the judge would have received if he or she had remained on the bench full-time until age 75, or 50% of the amount of the income continuity payment the judge was receiving or was entitled to receive when he or she died. The judges' associations have proposed that those percentages be increased from 50% to 60% of the judge's entitlement.

We agree. According to s. 45(3) of the Pension Benefits Act, 1987[272] the amount of the survivor allowance payable to spouses of former members of registered pension plans in Ontario "shall not be less than 60 per cent of the pension paid to the former member during the joint lives of the former member and his or her spouse." This provision is not, at present, binding upon the pension arrangements for Provincial Court judges; the current plan is exempted by regulation from the terms of that statute.[273] We recommend below that that exemption continue. Nonetheless, we believe that the survivor allowances payable to spouses of deceased Provincial Court judges should be no less generous than they would have to be if the general statute governed. **We recommend that ss. 11(2) and 12(2) of O.Reg. 332/84, as amended, be amended by replacing the words "one-half" with "sixty per cent" in each instance.**

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[271] Section 23 of O.Reg. 332/84 provides that "No person is entitled to payment of two income continuity payments under this Regulation during the same month or payment period," and s. 17a rules out receipt of survivor allowance and unreduced group life insurance benefits with respect to the death of the same judge, but there is no provision prohibiting payment of two differently calculated survivor allowances to the same person.

[272] S.O. 1987, c.35

d. Amount of the Reduced Group Life Insurance

As the judges' associations correctly pointed out, the $1500 to $2000 in life insurance benefits now provided in respect of judges who are no longer eligible for the group life insurance coverage is insufficient even to reimburse the family for the cost of burial. **We recommend, therefore, that s. 31a of O.Reg. 332/84, as amended, be amended to provide Provincial Court judges who have left office, met the basic service requirement or reached the age of 70 with $3000 in life insurance coverage. The present annual stepwise reductions in such coverage should be discontinued.**

e. Indexing

According to s. 16(1) of the Provincial Judges Benefits Regulation, the amounts of annual survivor allowances are to be indexed annually as though they were allowances subject to the Superannuation Adjustment Benefits Act.[274] According to s. 4 of that statute, the annual adjustment ratio is based on increases in the cost of living as reflected in the Consumer Price Index, subject to an aggregate annual ceiling of 8%. By contrast, the income continuity payments payable to retired Provincial Court judges themselves are adjusted in accordance with increases in the salaries of the judges of the highest judicial rank that the judge attained while holding office.[275]

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[273] O.Reg. 708/87, s. 43(2), para. 2.

[274] R.S.O. 1980, c. 490.

We can see no good reason for this discrepancy. Prima facie, the spouses of deceased Provincial Court judges are no less in need of the benefits of increases than are retired Provincial Court judges themselves. **We recommend that O.Reg. 332/84 be amended to provide that survivor allowance payments be adjusted, effective April 1, 1987, in accordance with increases in the salaries of the judges of the highest judicial rank held by the judge in respect of whom the survivor allowance is paid.**[276] This recommendation has the added advantage of simplifying somewhat the pension scheme as a whole.

3. The Cost of Pension Benefits

At present Provincial Court judges make no contribution to the cost of providing their own retirement income; the cost of those benefits is paid out of contributions previously transferred from the Public Service Superannuation Fund into the Provincial Judges Benefits Fund and out of amounts the Ontario government credits to the latter fund. Provincial Court judges do, however, contribute 5.57% of salary toward the combined cost of the survivor benefits.[277] According to the regulation, the Provincial Judges Benefits Board apportions these contributions between the payment of the premiums for the group life insurance and the cost of paying the survivor allowances.[278] In practice, each judge individually is allowed to determine whether his or her contributions will be directed principally toward the cost of the group life insurance premium, with the remainder going toward the survivor allowance, or entirely to the survivor allowance. The vast majority of judges prefer the former option, apparently for income tax reasons.

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[275] O.Reg. 332/84, as amended, s. 10.

[276] If our earlier recommendation about automatic adjustment of Provincial Court judges' salaries is accepted, the effect of the present recommendation will be to remove the 8% annual ceiling on cost of living adjustments to the survivor allowance payments. Only in years when salaries themselves are refigured by Provincial Courts Committees (or Commissions) will it be otherwise.

[277] O.Reg. 332/84, as amended, s. 24.

We see no reason to disturb the general structure of this arrangement. No one suggested to us that Provincial Court judges should be asked to contribute toward the cost of their retirement benefits. In one respect, however, we think the present structure should be adjusted.

If the government implements the salary increase and the survivor allowance enrichment that we have recommended, the cost of the combined survivor benefit package will increase. It is only reasonable that the judges themselves bear a fair proportion of that increase in cost.

The current proportion of salary that Provincial Court judges contribute to the cost of the combined survivor benefits--- 5.57% -- is the proportion recommended by the Provincial Courts Committee on March 27, 1984. That figure was chosen because it represented "half the cost of the survivor's component of the plan."[279] We share our predecessors' view that the judges ought to contribute half the cost of survivor benefits, even if that means an increase in the percentage of salary the judges must contribute. **We recommend that, effective April 1, 1987, Provincial Court judges be required to contribute a percentage of salary equal to half the cost of the combined survivor benefits, as determined annually by the Ontario Government Actuary.**

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[278] O.Reg. 332/84, as amended, s. 24(3).

[279] Recommendations of Ontario Provincial Courts Committee Respecting a Revised Retirement System for Provincial Judges, March 27, 1984, p. 3.

4. Interest on Refunded Contributions

There are a number of circumstances in which a judge, or his or her estate, is entitled to a refund of contributions made with respect to the pension plan. Judges who leave office "for a reason other than death" before becoming entitled to income continuity payments are entitled to a refund, with interest, of the contributions they made to the cost of survivor allowance.[280] Judges in this group who held office before July 1, 1984 are also entitled to a refund, with interest, of any unrefunded contributions they made to the Public Service Superannuation Fund before that date, provided that those contributions were not "locked in" according to PSSA rules in force at the time.[281] The estates of judges who die without leaving anyone to whom a survivor allowance is payable are paid a refund, with interest, of the judge's survivor allowance contributions.[282] When a survivor allowance ceases to be payable with respect to the death of a judge, that judge's estate is entitled to a refund, with interest, of the judge's survivor allowance contributions, reduced by the amount, with interest, of the survivor allowance payments actually paid out in respect of that judge.[283] If the judge who died was appointed before July 1, 1984, his or her estate is entitled as well to a refund, with interest, of his or her own contributions to the Public Service Superannuation Fund, reduced by the amount, plus interest, of any income continuity payments actually paid to the judge.[284] The rate of interest payable on refunded amounts for any given year is one per cent less than the arithmetic average of the interest rates paid by the Canadian chartered banks on non-chequable savings deposits for the previous twelve month period. Interest compounds annually.[285]

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[280] O.Reg. 332/84, s.26

[281] O.Reg. 332/84, as amended, s. 44a.

[282] O.Reg. 332/84, as amended, ss. 25(1), (2)(a),(3)(a).

[283] O.Reg. 332/84, as amended, ss. 25(1), (2)(b), (3)(a), (c), (d).

[284] O.Reg. 332/84, as amended, ss. 25(1), (2), (3)(b), (3a).

[285] O.Reg. 332/84, as amended, s. 39.

Our present concern is with the periods during which the interest on refunded contributions accrues. Judges entitled to refunds of their survivor allowance contributions are now paid interest "on each amount allocated for the period of time the amount was credited to the judge."[286] Judges entitled on leaving office to refunds of their transferred Public Service Superannuation Fund contributions are paid interest "from the date of the transfer to the end of the month in which the judge ceased to hold office."[287] Interest on refund payments made to judges' estates accrues only "from the date it was contributed [or, in the case of refundable contributions transferred from the Public Service Superannuation Fund, 'transferred'] to the end of the month in which the judge died or the last survivor allowance is payable, whichever is later."[288]

In none of these situations is it clear that interest is payable until the date of the refund; in some of them it is clear that accrual stops well short of that date.

We consider this inappropriate. When the regulation requires that monies be refunded to a judge or to his or her estate, the Ontario government should be liable for interest for the entire period during which it has use of the refund monies it owes. **We recommend that the interest owing on refunded contributions continue to accrue until the date the refund is paid to a judge or to his or her estate.**

5. Retroactive Effect of Our Recommendations

On December 13, 1979 the Ontario government and the judges' associations agreed to the formation of the first Provincial Courts Committee. One of the terms of that agreement was that a new pension plan for Provincial Court judges would "cover all Judges who are active as of October 1,

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[286] O.Reg. 332/84, as amended, s. 26.

[287] O.Reg. 332/84, as amended, s. 44a.

[288] O.Reg. 332/84, as amended, ss. 25(3)(a),(b).

1979."[289] Based primarily on that agreement, the judges' associations requested that we extend the benefit of any enhancements we recommend to Provincial Court judges' pensions to all judges who were serving full-time on October 1, 1979. The Ontario government's reply was that the terms of the agreement had been fulfilled by the implementation of the pension plan now in place; as a result, there was no remaining obligation to apply the benefit of any such enhancements retroactively.

On the legal issue we agree with the Ontario government: the judges' associations cannot claim as of right the retroactive benefit of what we have recommended. We remain impressed, however, with the force of the principle enunciated in our predecessors' report of March 27, 1984: that the plan should "avoid the creation of two classes of judges."[290] We recognize, as well, that any further subdivision of groups of judges for pension purposes would further complicate an already byzantine regulation. Accordingly, **we recommend that, effective April 1, 1987, the income continuity payments recommended in this report apply to judges who were active on October 1, 1979. We recommend further that, effective April 1, 1987, the survivor allowance recommended in this report apply to the eligible spouses or children of judges who were active on October 1, 1979.**

We recommend further that the fourth line and the last line of subsection 43-(3) of Ontario Regulation 332/84 be amended by striking out, in each case, "the 1st day of July 1984" and inserting in lieu thereof "the 1st day of April 1987".

We recommend further that the fourteenth line of subsection 45-(1)(6) of Ontario Regulation 332/84 as amended be further amended by striking out "45 percent" and inserting in lieu thereof "55 percent."

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[289] The agreement is reproduced as Appendix C to this report. The provision quoted is on p. 3 of the agreement.

[290] See quotation at note 236, above.

6. Discretionary Pensions

According to s. 22 of the Provincial Judges Benefits Regulation, the Lieutenant Governor in Council has discretion to award either lump sums or income continuity payments to judges who leave office without having qualified for retirement income continuity, if it "is of the opinion that the ceasing to hold office was conducive to the better administration of justice."[291] There are, as well, two other provisions in the regulation that authorize the exercise of Cabinet discretion with respect to income continuity payments. Section 43(5) provides that the Lieutenant Governor in Council may award income continuity payments to judges who left office between October 1, 1979 and July 1, 1984 without having met the basic service requirement. Section 45(2) gives it essentially the same discretion with respect to Provincial Court judges who ceased to serve full-time before October 1, 1979 and who had not met the basic service requirement when they left office. Initial amounts of any such payments are for Cabinet to determine; once awarded, the ordinary indexing rules apply to any ongoing payments.

On July 19, 1985 the predecessor to this Committee was asked by the Ontario government to recommend objective criteria for the exercise of this discretion. The Committee had ceased to operate before it could comply with that request. Prompted, perhaps, by the submission of a retired judge, the government renewed its request before us. Unfortunately, it renewed its request very late in the day. The submissions before us dealt only in a minor way with this problem. Detailed information regarding potential applicants for this relief is lacking.

If the government does wish us to address this problem and recommend guidelines to be used by the Lieutenant Governor in Council in considering such applications, we are prepared to reconvene. Before we do so, however, the government will have to indicate its response to our general pension recommendations, advise us that it wishes us to perform this additional task and provide the funding necessary for its completion.

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[291] O.Reg. 332/84, as amended, s. 22.

In the meantime, there are at least two petitions for discretionary relief still awaiting consideration. We see no reason for the Lieutenant Governor in Council to defer consideration of those petitions on their merits pending our supplemental report.

Notwithstanding the foregoing, there is one anomaly we prefer to deal with here.

At present the discretion to award lump sums or income continuity payments may only be exercised on behalf of former judges themselves; there is no power to assist the judges' spouses or children. If a judge requests and is granted an income continuity payment pursuant to these provisions, there is no problem: when the former judge dies, the spouse or the children will be entitled as of right to a survivor allowance. If, however, the former judge dies without having made any such petition for discretionary relief, the spouse and children cannot be awarded a discretionary survivor allowance. There may well be circumstances in which such an allowance would be appropriate. **We recommend that O.Reg. 332/84 be amended to confer discretion on the Lieutenant Governor in Council to award survivor allowances, in initial amounts it thinks fit, to the spouses or eligible children of deceased former judges who, while they were alive, were entitled to seek discretionary relief under ss. 22, 43(5) or 45(2) of the Provincial Judges Benefits Regulation.**

7. Exemption from the Pension Benefits Act, 1987

At present the plan prescribed by the Provincial Judges Benefits Regulation, O.Reg. 332/84, as amended, is exempt from the registration requirements imposed by the Pension Benefits Act, 1987[292] and therefore from the conditions that statute imposes.[293] This, in our view, is as it should be. Provincial Court judges, as a cohort, are a highly unusual group for purposes of pension plan design: they tend to be older and more often male, and their careers as judges are rather short. Ordinary pension arrangements have proved to be inadequate to provide sufficiently for judges' retirement. These circumstances, reinforced by the constitutional principle of judicial independence, require more flexibility than a general pension benefits statute can be counted on to accommodate. **We recommend that the Ontario government continue exempting the pension plan for Provincial Court judges from the Pension Benefits Act, 1987.**

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[292] S.O. 1987, c.35.

[293] See O.Reg. 708/87. s. 43(2), para. 2.

8. Refunding PSSA Contributions: Special Cases

Before the implementation of the Provincial Judges Benefits Regulation on July 1, 1984, Provincial Court judges participated in the Public Service Superannuation Plan, the pension plan established for Ontario public servants. As members of that plan they were required to contribute 6% of their salaries to the Public Service Superannuation Fund ("PSSF"). The 6% figure was reduced by the amount a judge was required to contribute to the Canada Pension Plan. These contributions were matched by contributions from the Ontario government. Upon retirement, a judge was entitled to a pension equalling 2% of his or her best five years' earnings for each year of contributory service to the plan, to a maximum of 35 years (or 70%). Within that regime, the judge had the option of purchasing additional service credit in the PSSF by making voluntary contributions to the plan in respect of years spent in other sorts of designated service (military service, for example) or, if he or she had service credit in another pension plan whose credits were portable with those in the PSSF, by transferring into the PSSF employer and employee contributions made to that plan in respect of their service.

When the Provincial Judges Benefits Fund ("PJBF") was established on July 1, 1984, all the PSSF contributions that had been made in respect of judges who had been active since October 1, 1979 -- those of the judges and those of the government -- were transferred into the PJBF, together with the interest they had accumulated. Except for those transferred contributions, no further contributions were required of Provincial

Court judges toward the cost of their own retirement benefits. In return for their transferred contributions, the judges who were appointed before July 1, 1984 were guaranteed that their pension entitlement at retirement would not be less than it would have been if they had continued to participate in the previous plan. Those judges, in other words, receive a pension based either on the rules in the current plan for Provincial Court judges or on the rules set out in the PSSA, whichever is to their advantage at the time they retire.

For the vast majority of these judges, the pension the current plan provides will be the more generous. It will only be otherwise if a judge leaves office without having met the minimum qualifications for an income continuity payment under the current plan or accumulates enough years of service to reach the break-even point between the two computations. The break-even point has been estimated to be anywhere between 23.75 and 28 years of service. As a result, for most of these judges, their transferred PSSF contributions purchase them no increment in pension benefit for any years of service beyond the fifteenth. If they accumulate fifteen years of judicial service on or after July 1, 1984, their transferred contributions will have earned them no additional credit.

The previous Provincial Courts Committee recognized this situation and went some distance to try to deal with it fairly. Nonetheless, some perception of unfairness remains; we received three submissions requesting that we recommend the refund of certain still unrefunded contributions that were transferred into the PJBF from the PSSF.

Because these matters concern only some Provincial Court judges and raise highly technical questions, we have decided to deal with them in an appendix. Appendix F of this report sets out our conclusions and recommendations with respect to the transferred PSSF contributions that have not already been refunded.

9. Sickness and Disability Benefits

Provincial Court judges now enjoy both short term and long term sickness and accident benefits. Each judge, upon completing

20 consecutive working days in office in any given year, is entitled to up to 130 working days' (or six months') leave with full pay for reasons of illness or injury.[294] If, after six months have elapsed, the judge remains totally disabled, is receiving care from a qualified doctor and is not engaged in any other remunerative activity, he or she begins receiving long term income protection payments equal to 2/3 of the regular salary of a full-time judge (less any benefit amounts the judge receives from workers' compensation, Canada Pension Plan or income continuity). Such payments continue until the total disability ceases or until the judge dies or turns 65, whichever comes first. The government pays 85% of the premium for the long term income protection coverage; the remaining 15% is paid by participating judges.[295] The time a judge spends on the long term income protection plan counts toward satisfaction of the basic service requirement for retirement income.[296]

Only two aspects of these arrangements require further comment.

First, no judge is entitled to more than seven days' leave with pay for injury or illness unless he or she provides the Chief Judge with a medical certificate. In addition, the Chief Judge or the Provincial Judges Benefits Board may require any judge to produce such a certificate with respect to any period of absence.[297]

We do not think Provincial Court judges should, as a matter of law, be required to certify their medical condition after seven days of leave with pay for sickness. Neither do we believe that the Provincial Judges Benefits Board should have discretion to insist that judges document their absence for illness; only the Chief Judge or his or her delegate should have that power. **We recommend that section 68 of Regulation 881, as amended,**

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[294] O.Reg. 332/84, s. 29.

[295] O.Reg. 332/84, as amended, s. 30.

[296] O.Reg. 332/84, as amended, ss. 4(5)(c), 7(c).

[297] O.Reg. 332/84, as amended, ss. 32(3)-(5), incorporating Regulation 881, R.R.O. 1980, s. 68.

cease to apply to Provincial Court judges. Instead, we recommend that the Provincial Judges Benefits Regulation be amended to give the Chief Judge discretion to require any judge to submit a medical certificate in respect of time away from work because of illness or injury.

Second, s. 30(6) of the Provincial Judges Benefits Regulation contains a two-stage definition of "total disability." Until the end of the second full year of long term income protection, "total disability" is defined as "the continuous inability, as the result of illness or injury, to perform any and every duty of a judge." In the third and subsequent years, it means "the inability, as the result of sickness or injury, to perform any and every duty of any gainful occupation for which the person is reasonably fitted by education, training or experience." The judges' associations point out that this definition could result in denial of the benefit to a judge who remained unable to resume judicial duties but who, after more than two and a half years of disability, could perform some other kind of work.

We recommend that section 30(6) of O.Reg. 332/84 be amended to read: "In this section, 'total disability' means the continuous inability, as the result of illness or injury, to perform any and every duty of a judge."

10. Benefits Shared with Provincial Civil Servants

Section 32 of the Provincial Judges Benefits Regulation incorporates by reference, mutatis mutandis, s. 15 and much of Part VI of Regulation 881, R.R.O. 1980, as amended, the general regulation under the Public Service Act.[298] By doing so, it confers on Provincial Court judges a number of benefits enjoyed from time to time by management level employees of the Ontario government.

We comment below on several of these benefits; we deal with others elsewhere in this Part. Irrespective of our conclusions about the appropriateness of these particular benefits, however, we are disturbed by use of the mechanism of incorporation by reference in a compensation regime for Provincial Court judges: especially when the provisions incorporated by that means have been designed to apply to Ontario government employees. For reasons already given above, we consider such linkage inconsistent in principle with the independence of Provincial Court judges. Of special concern, however, is the fact that the Provincial Court judges may be affected, automatically but inappropriately, by any changes the government may subsequently wish to make to the benefits it gives to its own employees. **We recommend, therefore, that all forms of compensation provided to Provincial Court judges, except those conferred by statute, be set out in regulations that pertain exclusively to Provincial Court judges, or at least to provincial judicial officers.** That will assure that Provincial Court judges' remuneration cannot be altered inadvertently.

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[298] R.S.O. 1980, c. 418.

a. The Workers' Compensation Supplement, The Termination Benefit and the Death Payment

Section 67 of Regulation 881, as amended, assures continuation of a judge's regular salary for the first thirty days after an injury or industrial disease for which a claim is made under the Workers' Compensation Act,[299] and, if the claim is accepted by the Workers' Compensation Board, for up to three additional months (or 65 discontinuous working days). It also commits the Ontario government to maintain the judge's group insurance premiums for the entire duration of any absence that results from injury or industrial disease compensable under the Workers' Compensation Act.

We find this provision, applied to Provincial Court judges, peculiar. Any Provincial Court judge who has worked 20 days in a given year is entitled to up to six months of leave at full pay for illness or injury, whether or not the illness or injury happened on the job.[300] And any judge receiving benefits from the Long Term Income Protection Plan is entitled to have the Crown continue to pay its share of the group insurance premiums on his or her behalf.[301] Except for those first twenty days of service in a given year, therefore, this provision seems redundant.

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[299] R.S.O. 1980, c. 539, as amended.

[300] O.Reg. 332/84, s. 29.

We recommend that s. 67 of Regulation 881, as amended, cease forthwith to apply to Provincial Court judges. Any special provision for leave at regular salary for work-related injury or illness that occurs within a judge's first 20 consecutive days of work in a given year should be included in the Provincial Judges Benefits Regulation.

The termination payment[302] does have clear application to Provincial Court judges. When a judge dies or retires after completing at least one year of service, the judge (or his or her estate) is entitled to a payment equal to one week's salary for each year of continuous service since January 1, 1970; for judges appointed before January 1, 1970, the benefit with respect to the years before 1976 is computed differently.[303] Judges who leave office in any manner other than death or retirement must have served for at least five years to qualify for the benefit. The death payment -- an amount equal to one month's salary -- is payable to the estate of any judge who dies in office after having completed at least six months' service. The amount of any death payment is set off against any termination benefit the judge's estate would otherwise be entitled to receive.[304]

So far as we have been able to learn, Provincial Court judges were only given these benefits because management level Ontario public servants receive them; they have no independent justification in the context of Provincial Court judges' own remuneration. We disapprove in principle of such automatic elisions; in addition, we believe that the money that now goes toward the cost of providing these benefits to Provincial Court judges could better be spent to help defray the cost of increasing their salaries. That way the interest on those amounts would accrue to the judges' benefit. **We recommend that the termination payment and the death payment described in ss. 86-94 of Regulation 881, as amended, cease to be available to Provincial Court judges as of the date our recommendations are implemented.**

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[301] O.Reg. 332/84, as amended, s. 33.

[302] Regulation 881, R.R.O. 1980, as amended, ss. 86-93.

[303] Judges have the alternative of taking terminal leave with pay for a period equal to the period of service represented by the amount of their termination payment, or the period between the day they leave office and they turn 65, whichever is the shorter.

[304] Regulation 881, R.R.O. 1980, s. 94.

Discontinuance of these three benefits would not, in our view, constitute a diminution of Provincial Court judges' remuneration and does not impair their independence. As long as the recommendations removing these benefits are implemented along with our other recommendations for increased salaries and pensions, the net effect of implementation will be to augment significantly the remuneration Provincial Court judges receive. Dealing with a somewhat similar package of adjustments Parliament made in 1975 to the compensation federally appointed judges were receiving, the Supreme Court of Canada held unanimously that judges could be required to shoulder a greater portion of the cost of certain benefits so long as the "comprehensive package did not diminish, reduce or impair" their total financial position.[305]

b. Health and Optional Life Insurance

The health insurance coverage that Provincial Court judges may have as judges is set out in ss. 83 to 85 of Regulation 881, as amended. The Ontario government pays the Ontario Health Insurance Plan (OHIP) premiums of all Provincial Court judges sitting full-time and a proportion of the premiums with respect to judges sitting part-time. The government also pays the premiums, on the same terms, for any judges who wish to subscribe to the supplementary health and hospital insurance coverage. That insurance covers most of the cost of prescription drugs, some of the cost of a semi-private hospital room, and certain medical procedures not covered by OHIP. The judge may elect additional coverage that pays for part of the cost of vision care and hearing aids; the government pays up to 50% of the cost of that coverage. Finally, Provincial Court judges are eligible to participate in the dental insurance plan provided to management level Ontario public servants. The government also pays that premium.

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[305] The Queen v. Beauregard, note 149 above, per Dickson, C.J.C. at 78. At 84 the Chief Justice added:

> Parliament could have reached precisely the same result by leaving the former non-contributory pension scheme in place but not raising salaries as much as it did. No one contests that this would have been constitutional. But if that is so, I see no reason why Parliament cannot achieve the same result in the way it chose.

In addition to the mandatory group life insurance coverage specific to Provincial Court judges and discussed above, Provincial Court judges may elect, at their option and at their own expense, to purchase supplementary life insurance coverage on their own lives and/or insurance on the lives of certain dependants through the plans already in place for provincial government management employees.[306]

All such coverage, except the OHIP coverage, is optional. Because that is so, we see no objection to permitting Provincial Court judges to continue, if they wish, to participate in the insurance programs the government has for its own employees, so long as every judge is aware that other coverage is available elsewhere. We do not consider it inappropriate that the government continue to pay the judges' OHIP premiums.

The judges' associations, however, have expressed some dissatisfaction with certain features of these government plans; in some respects, for instance, they believe the coverage should be more generous. For present purposes we need not list these concerns in detail.

In our view the Ontario government should not be required to alter the terms of the group insurance it provides to its own employees in order to conform to the preferences of the judges' associations. The judges' associations may, if their members wish, arrange for supplementary life or health or dental coverage privately at their own expense. The salary increases we recommend would make this option more feasible.

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[306] Regulation 881, R.R.O. 1980, ss. 79-80.

We do not intend, however, to discourage the judges' associations and the Ontario government from meeting to negotiate insurance arrangements tailored more precisely to the judges' preferences and from sharing the cost of such arrangements in a manner that both sides accept. We see merit in such negotiations, not least because the outcome, if successful, would further distinguish Provincial Court judges from those in the Ontario public service. The present structure, however, is neither unfair nor so discordant with the judges' independence as to warrant a formal recommendation.

C. VACATION AND LEAVE ARRANGEMENTS

1. The Management Compensation Option

In addition to annual vacation, Provincial Court judges, in common with management level employees in the Ontario public service, currently receive five further days to which the "management compensation option" applies. Compensation option days may be taken as days of additional leave with pay; alternatively, the judge or employee may have one day's additional salary for each of them.[307]

Here again, we believe that Provincial Court judges should be kept distinct from provincial public servants. The additional salary dollars it costs to provide Provincial Court judges with the management compensation option can be more constructively spent to enrich their basic salaries and the five days' additional leave should not be necessary if the judges' basic vacation entitlement is made sufficient. If our recommendations on annual vacation are accepted, **we recommend that the management compensation option cease to be offered to Provincial Court**

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[307] Regulation 881, R.R.O. 1980, as amended, s. 15, incorporated by O.Reg. 332/84, as amended, ss. 32(1)-(2).

judges, effective January 1 of the calendar year immediately following the year in which our recommendations are implemented.

2. Annual Vacation

Under current regulations, Provincial Court judges are entitled to one month's vacation annually; unused vacation may be carried forward for use in a subsequent year, but a judge may not accumulate more than a total of two months' vacation leave.[308] By convention, "one month" equals 22 working days.

The judges' associations and several others who made submissions to us urged that we recommend that the judges be given eight weeks' vacation annually. In support, these submissions cited Mr. Justice Zuber's recommendation that "the sitting year for a judge should consist of 44 weeks, including judgment weeks and judicial training courses."[309]

Although we agree that Provincial Court judges should be given more than one month's annual vacation, we are not prepared to recommend that each judge be given eight weeks. **We recommend that each Provincial Court judge be entitled to six weeks' annual vacation, and that vacation credits unused in a given calendar year be carried forward into the next year, subject to a maximum total accumulation of twelve weeks.**

3. Special Purpose Leave

a. Bereavement or Compassionate Leave

At present the Chief Judge has discretion to confer up to three days' bereavement leave on a judge in a given year and up to six days' additional leave on special or compassionate grounds.[310] We take it as given that references to "mother" and "father," "son" and "daughter," and "brother" and "sister" among the class of relatives whose death entitles a judge to bereavement leave include adoptive parents, children or siblings, and that the word "spouse" is treated as having the broader definition it received in part III of the Family Law Act, 1986.[311] On that assumption, these provisions, which drew no attention in the submissions before us, require no further comment.

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[308] Regulation 811, R.R.O. 1980, as amended, s.6.

[309] Zuber Report, note 5 above, at p. 171.

b. Maternity Leave

Pregnant Provincial Court judges who have completed at least one year of service, either as judges or as provincial Crown employees immediately before appointment, are entitled to at least seventeen weeks' maternity leave, including at least six weeks after the date the child is born;[312] such leave may be extended by up to six additional months upon application to the Chief Judge.[313] Maternity leave is leave without pay and without sick leave credit accumulation;[314] there is, however, an allowance payable to the judge during the initial seventeen weeks of leave. For the first two weeks of leave, the allowance amounts to 93% of the judge's weekly pay; thereafter that weekly amount is reduced by the amount of the pregnancy benefit she could receive if she were covered by the Unemployment Insurance

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[310] Regulation 811, R.R.O. 1980, ss. 3(a),(b). Compassionate leave is charged against sick credits; bereavement leave is not.

[311] S.O. 1986, c. 4. We have discussed the definition of "spouse," in the context of entitlement to the survivor benefits, at pp. 107-108, above.

[312] O.Reg. 332/84, as amended, s. 30a(2), incorporating ss. 36(1) and (2) of the Employment Standards Act, R.S.O. 1980, c. 137, as amended.

[313] O.Reg. 332/84, as amended, s. 30a(6).

[314] O.Reg. 332/84, as amended, s. 30a(2).

Act, 1971.[315] It is common ground that unemployment insurance coverage is not available to Provincial Court judges.

In most respects these provisions are inadequate. In the first place, there is insufficient reason for the requirement that a judge complete one year's service before becoming eligible for maternity benefits. Such requirements do have some utility in other contexts: they serve to ensure that the woman has established some connection with the work force and that she has not sought work with the sole intention of obtaining eligibility for maternity benefits. Provincial Court judges, however, are appointed with security of tenure until age 65; candidates accept such appointments with the intention of serving for the duration. It is pointless and demeaning to require such appointees to serve for a year before they are entitled to pregnancy leave. **We recommend that Provincial Court judges be eligible for pregnancy leave and maternity allowance irrespective of their length of service when they give birth.**

Second, it takes singular cheek for the government to set off against the judges' maternity allowance an imputed benefit that, for judges, is wholly fictional. Part of the rationale for this deduction, we understand, is that the Ontario government wishes to pay maternity benefits to judges on the same basis as it does to its public servants.[316] In this way, the judge will not receive a benefit for which she has not paid. Such reasoning, in our opinion, is inconsistent with a proper recognition of the Provincial Court's independence.

Finally, there is nothing in the nature of judicial service that in our view justifies a reduction in a Provincial Court judge's pay during the seventeen weeks of paid pregnancy leave. The fact that the government reduces to 93% the amount it pays its own employees during pregnancy leave is irrelevant. **We recommend, therefore, that pregnant Provincial Court judges be entitled to seventeen weeks' maternity leave at regular pay**

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[315] O.Reg. 332/84, as amended, s. 30a(3). See Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, as amended.

[316] Compare, e.g., s. 70(4) of Regulation 881, R.R.O. 1980, as amended, the general regulation under the Public Service Act, with s. 30a(3) of the Provincial Judges Benefits Regulation.

but without sick leave credit accumulation. Judges on maternity leave should continue to be able to apply for up to six months' additional leave without pay consecutive to that period.

c. Parenting and Adoption Leave

There is no current provision for paid leave for Provincial Court judges who are adoptive fathers or mothers or are natural fathers of newborn children. The judges' associations have submitted that adoptive mothers should be entitled to leave with pay on the same terms as natural mothers, and that both adoptive and natural fathers should be entitled to up to ten days' paternity leave with pay upon the birth or first arrival of a child. In addition, they request that each judge be entitled to up to five days' annual leave with pay to deal with children's illnesses, medical appointments and similar occurrences.

We agree with the principle of parenting and adoption leave and urge that the Ontario government provide it for Provincial Court judges. The subject was not, however, fully canvassed in the submissions before us. Moreover, we have reservations about the structure and duration of the leave proposed by the judges' associations. We hope this important subject will be explored more fully before the next Provincial Courts Committee or Commission. As an interim measure, **we recommend that males who father children and males or females who adopt children after appointment to the Provincial Court be entitled to ten days' leave at regular pay with respect to the birth of such children or their first arrival in the family.**

We do not recommend additional leave with pay for family illnesses or appointments.

4. Extended Leave, With or Without Pay

Under present law there are two similar sets of provisions under which Provincial Court judges, after obtaining proper authorization, may take leaves of absence from their duties, either with pay or without. One set of arrangements is unique to Provincial Court judges; the other applies to them in common with Ontario government management level employees.

The first set gives the Chief Judge discretion to grant any judge a leave of absence without pay for up to one month[317] and gives the Attorney General discretion to grant a judge up to three years' leave of absence without pay upon the Chief Judge's recommendation.[318] Under these rules, a judge may obtain extended leave of absence with pay only from the Lieutenant Governor in Council upon the recommendation of the Attorney General, and only for special or compassionate purposes. The maximum duration of such leave is one year.[319]

Under the other arrangement, a Provincial Court judge, like any management level Crown employee, may obtain up to two years' leave of absence, with or without pay, in order to take temporary employment with the government of Canada or with any other agency in the public or private sector, provided that he or she obtains the approval of the Chief Judge. If the Chief Judge gets the further approval of the Deputy Minister, Human Resources Secretariat, he or she may grant a judge up to five years' leave, with pay or without, for temporary employment purposes. If such leave is granted with pay, the employing agency is required to reimburse the Ontario government for the judge's salary and the contributions the government will have continued to make on the judge's behalf.[320]

These two sets of provisions fit together in a way that makes almost no sense. Why should the Chief Judge have the power to grant a judge up to two years' leave with pay to take other employment and not have the power to grant a judge more than six days' paid compassionate leave? Again, why should it take a decision of Cabinet and a recommendation from the provincial Attorney General for a judge to be allowed six months' or a year's leave of absence with pay, when the Chief Judge, acting on his or her own, may grant the judge up to two years' leave with pay to take other employment? Whatever one may think about the two arrangements individually, their combined effect is unfortunate.

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[317] Regulation 811, R.R.O. 1980, s. 3(c).

[318] Regulation 811, R.R.O. 1980, s. 4.

[319] Regulation 811, R.R.O. 1980, s. 5.

[320] Regulation 881, R.R.O. 1980, s. 75, incorporated by O.Reg. 332/84, as amended, ss. 32(3)-(5). Section 75 gives the discretion to grant such leaves of absence to the deputy minister, not the Chief Judge, but s. 32(5)(b) of the Provincial Judges Benefits Regulation deems references to the "deputy minister" to be references to the Chief Judge when these provisions are applied to Provincial Court judges.

Much more serious, in our view, are the ways in which the second extended leave arrangement compromises the perception and the reality of judicial independence. To begin with, we are uneasy about applying to judges arrangements designed for government employees; as we have said a number of times, Provincial Court judges' benefits should be fashioned with a view to their unique occupational situation. Even apart from that, however, these arrangements attract particular criticism. We can think of no reason why the Deputy Minister, Human Resources Secretariat should have any authority with respect to Provincial Court judges' requests for extended leaves of absence; any such power creates potential for interference with judicial decisions. And it seems to us inappropriate, as it did to the late Chief Justice of Canada,[321] that Provincial Court judges, while retaining their judicial office, be able to take positions within the Ontario or the federal government. We accept that it is now provincial government policy that sitting judges will not be offered secondments to government jobs; the statutory power to make such offers, however, remains. **We recommend that section 75 of Regulation 881, as amended, cease forthwith to apply to Provincial Court judges.**

The current extended leave provisions specific to Provincial Court judges are not entirely satisfactory, either. We do not believe the Attorney General ought to be involved in approving or making recommendations about individual judges' leave requests; those are functions that ought ordinarily to be reserved to the three Chief Judges of the Provincial Court. In addition, we believe the Chief Judge should have wider discretion to authorize longer periods of leave. We are reinforced in that view by the fact that the regulation now empowers Chief Judges to grant up to two years' paid or unpaid leave to judges who want to take temporary employment. **We recommend that the Chief Judge be given authority to grant a judge up to three months' leave at regular pay on special or compassionate grounds and up to one year's leave without pay or sick leave credit accumulation. We recommend further that the Lieutenant Governor in Council have power, on the recommendation of the Chief Judge, to grant a judge up to one year's leave of absence with pay on special or compassionate grounds and up to three years' leave without pay or sick leave credit accumulation.**

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[321] Letter from the Right Honourable Bora Laskin to Attorney General Roy McMurtry, January 27, 1982. A copy of this letter was released to this Committee by the Ontario government with Mr. McMurtry's permission.

5. Chambers Days and Judgment Weeks

One of the concerns expressed to us about Provincial Court judges' working conditions is that the judges often do not have sufficient time to prepare written reasons for their case dispositions. At least some judges, we understand, would prefer to be able to reserve judgment and prepare written reasons more often. Given the complexity of many of the matters that now come before Provincial Court judges, we understand this preference. This Committee has been invited to recommend that judges be given assigned chambers days or judgment weeks during which to complete their reserved decisions and to engage in related legal research. We think it best to leave the Chief Judges with discretion to assign judicial duties in ways that seek to accommodate judges who need chambers days, to the extent that the schedule and the caseload will permit it.

6. Sabbatical Leave

Many submissions suggested Provincial Court judges be given a right to a period of sabbatical leave at full or partial pay after a certain number of years of service on the bench. The details of the proposals differed; underlying them, however, was a shared sense that Provincial Court judges would benefit from occasional periods during which they could round out, in a systematic way, their understanding of the law or of a related academic discipline, acquire new perspective on the subject matter of the cases that come before them, and return to the bench refreshed and with renewed interest in their work. It was submitted that these results would enhance the quality of justice in the Provincial Court.

Counsel for the Ontario government made no objection in principle to the adoption of a program of sabbatical leave but said that the cost of such a plan at present would be prohibitive. It would take a number of additional judges to be able to deal with the continuing caseload in the absence of the judges who were on sabbatical and it would cost additional money to provide chambers and other facilities to those additional judges.

We favour the further investigation of this topic. On the basis of the information supplied to us, we are not able to recommend a sabbatical leave program based on the university or any other model. Much thought will need to be given to the type of work a judge will or could do while on a sabbatical leave; the goals for such a program need to be clearly defined and accepted and the resources necessary for its implementation ascertained.

D. ALLOWANCES

1. Mileage Allowance

Because of the number of cases to be heard in Provincial Court and the number of locations that have to be serviced, many Provincial Court judges travel extensively; very often the timing, the location or the distance involved makes it necessary for them to use their own cars. The Ontario government reimburses the judges in accordance with a formula based on the distance travelled. Everyone before us agreed that such monies ought to be paid; the disagreement centred on the structure and the amount of this allowance. Provincial Court judges are now allowed 27.5 cents per kilometre for the first 4000 kilometres of travel in their private cars in the course of judicial business in a given year; 22 cents per kilometre for the next 6700 kilometres; 18 cents per kilometre for the 13,300 kilometres after that, and 15.5 cents per kilometre for their remaining travel in that year. Judges based in northern Ontario receive an additional one-half cent per kilometre throughout this descending scale. As the judges' associations and others observed before us, the maintenance and depreciation costs for the automobile do not diminish as the mileage increases; if anything, they do the opposite.

Asked for an explanation of current mileage allowance structure, the Ontario government said:

> The mileage rates paid to Provincial Judges for the use of their personal automobiles are the same mileage rates paid to all persons who charge the Government of Ontario for the use of their personal automobiles. The mileage rates are calculated according to a detailed formula which fully sets out the principles which explain why mileage is paid on a reducing scale. Put generally, the reason mileage is paid according to a reducing scale is that the marginal cost of operating an automobile reduces with the number of kilometres driven.[322]

This same scale is the one included in the collective agreement between the Management Board of Cabinet and the Ontario Public Service Employees Union. In that context, the government said, its soundness has been upheld on many occasions.[323]

Given the particular circumstances in which judges work, we are not convinced that there is any justification for reducing the amount of the allowance as the distance driven increases.

We recommend that the Lieutenant Governor in Council provide by regulation that Provincial Court judges be entitled to an allowance of 27.5 cents per kilometre travelled in their private

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[322] Reply Submissions to the Ontario Provincial Courts Committee, note 164 above, at p. 47.

[323] Ibid., pp. 47-48.

automobiles on assigned judicial duties, with no decrease in this rate as mileage increases.

The judges' associations have proposed that judges required to use their private cars on judicial duties in northern Ontario be entitled to an additional five cents per kilometre travelled, in recognition of the much greater distances and more difficult conditions encountered in that part of the province. We agree with the principle, but believe that an additional five cents per kilometre is not required. **We recommend that Provincial Court judges be entitled by regulation to an allowance of 28 cents per kilometre travelled in their private automobiles on assigned judicial duties in northern Ontario, with no decrease in this rate as the mileage increases.**

2. Other Travel Expenses

When Provincial Court judges are required to travel in the course of their duties by some means other than private automobile, Ontario government policy is to reimburse the reasonable expenses of such travel and transportation. The only general requirements are that no other means of transportation appropriate to the trip be significantly less expensive than the one the judge has chosen and that the judge, when travelling by air, utilize scheduled carriers when they service his or her destination.

Substantively, these provisions seem generally fair; the only complaint we received about them is that judges in northern Ontario sometimes have to spend several hours in small town airports waiting for return flights by scheduled carrier, because the scheduled flights are so infrequent. We agree that in such cases the judge's time is sometimes more valuable to the administration of justice than the money saved by insisting that he or she take scheduled carriers. It should be assumed that judges, as professional people, will make the prudent choice in travel arrangements.

In addition, we believe, as a matter of form, that Provincial Court judges' entitlement to travel and transportation expenses ought to be prescribed by law.[324] That would make it less vulnerable to routine changes in government policy.

We recommend that Provincial Court judges be entitled by regulation to reimbursement for all travel and transportation expenses certified by the Chief Judge to be reasonable and to have been incurred in the course of assigned judicial duties.

3. Meal Allowance

The Ontario government reimburses Provincial Court judges for their meals in the course of judicial duties, subject to the same daily maximums that apply to employees of the Ministry of the Attorney General: $7 for breakfast; $9 for lunch, and $16 for dinner, including gratuities. Amounts in excess of these limits may be reimbursed if the Chief Judge approves them, depending on the circumstances and the geographic location of the meals.

We understand that in practice the Ministry reimburses whatever amounts the Chief Judge approves, whether or not they fall within the usual Ministry limits. This, in our opinion, is as it should be. Imposing the Ministry's meal expense limits on Provincial Court judges shows insufficient respect for the fact that they are professionals and for their independence from the government. The policy ought to be brought into line with the practice. **We recommend that Provincial Court judges be entitled to reimbursement for reasonable meal expenses incurred in the course of judicial duties, subject only to the Chief Judge's approval.**

4. Conference Allowance

As a matter of policy, the Ontario government now reimburses the fees and other expenses Provincial Court judges incur for attendance at judicial or legal conferences, so long as the Chief Judge approves those expenses as reasonable. We heard no objection to this arrangement and therefore propose no change. For greater protection, however, we believe that Provincial Court judges ought to have this allowance prescribed by law.[325] **We recommend that the Lieutenant Governor in Council provide by regulation that Provincial Court judges be entitled to reimbursement for any fees and other expenses approved by the Chief Judge as reasonable and incurred for attendance at or participation in judicial or legal conferences.**

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[324] See the Judges Act, R.S.C. 1970, c. J-1, as amended, s. 21.

5. The Incidental Allowance

In addition to the allowances and reimbursements mentioned above, each Provincial Court judge also receives up to $1000 annually "for reasonable expenses actually incurred . . . and approved by the Chief Judge of the Provincial Court that are incidental to the fit and proper execution of the judge's office"[326] and for which no compensation or reimbursement would otherwise be available from the government.[327] This allowance is typically used to purchase judicial robes, luggage to transport judicial attire and court documents, books and publications not already provided to the judge,[328] and memberships in professional associations. Property purchased out of incidental allowance monies becomes the property of the Crown in right of Ontario when the judge leaves office.[329]

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[325] It is s. 22 of the Judges Act, R.S.C. 1970, c. J-1, as amended, that entitles federally appointed judges to reimbursement for their conference expenses.

[326] Regulation 811, R.R.O. 1980, as amended, s. 9(1).

[327] Regulation 811, R.R.O. 1980, s. 9(2).

[328] Each Provincial Court judge receives, at government expense upon taking office, a personal library of reference works and law reports essential to the mastery of the area of law-- criminal, family or general civil litigation -- in which his or her division of the Provincial Court must specialize. The incidental allowance is available to purchase law books in addition to those provided as part of this basic library.

The judges' associations submitted that the ceiling on the annual incidental allowance should be increased to $2500, because the cost of the items it is used to purchase has increased dramatically since 1981. In reply, the Ontario government suggested that we decline to recommend such an increase unless we are satisfied that Provincial Court judges actually incur as much as $2500 in incidental expenses annually.

We have no specific information about particular judges' actual annual incidental expenditures. In our view, however, the maximum amount of the incidental allowance ought to bear roughly the same relation to the actual current costs of the items on which it is meant to be spent as $1000 bore to the costs of analogue items in 1981. For that reason, we believe the ceiling on the allowance should be raised. **We recommend that the maximum amount of the incidental allowance now provided to Provincial Court judges be increased to $2000 annually, effective April 1, 1989.**

6. Representational Allowance for Administrative Judges

Sections 20(4),(5) and (6) of the federal Judges Act authorize an annual allowance to cover the "reasonable travelling and other expenses actually incurred by the judge or by the judge's spouse in discharging the special extra-judicial obligations and responsibilities that devolve on"[330] the judges of the Supreme Court of Canada and on the chief judges and chief justices of certain other courts. In their brief to this Committee, the administrative judges of the Provincial Court have asked that such allowances be available to them on similar terms.

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[329] Regulation 811, R.R.O. 1980, s. 9(8).

[330] Judges Act, R.S.C. 1970, c. J-1, s. 20(4).

This submission has merit. The Senior Judges, Associate Chief Judges and Chief Judges of the Provincial Court are, as such, often called upon to represent that court at extra-judicial functions and to provide appropriate hospitality. These responsibilities are a necessary part of the work of administrative judges. We see no good reason why the judges who happen to hold these appointments should be expected to bear these expenses personally. **We recommend that each administrative judge of the Provincial Court be entitled by regulation to an annual representational allowance for reasonable travel and other expenses actually incurred by such judge or his or her surrogate in discharging extra-judicial obligations and responsibilities on behalf of the court. The maximum annual representational allowances should be as follows: (a) for the Chief Judges, $2500 each; for the Associate Chief Judges, $2000 each; for the Senior Judges, $1500 each.**

E. THE COST OF OUR RECOMMENDATIONS

The preceding part of this report sets out our recommendations in detail. The question that remains to be answered is how much their implementation will cost.

The salary increases we propose will cost the government $5,687,088 for the year beginning April 1, 1987[331] and somewhat more thereafter, depending on the rate at which the cost of living increases. We have attempted no estimation of the additional cost to the government of the pension plan enhancements we have recommended. Any such estimation would be anchored to the actuarial assumptions on which it was based. We were confronted in argument with two conflicting sets of such assumptions: the rather cautious assumptions used by Ontario government actuaries, and the somewhat less cautious assumptions proposed by the actuary who gave evidence for the judges' associations. Each admitted that the other's assumptions came within the bounds of generally accepted actuarial practice. Neither side claimed that its assumptions had any empirical foundation in the actual retirement behaviour or mortality rates of Provincial Court judges. We ourselves are not qualified to choose between these conflicting assumptions.[332] And it is impossible to predict with confidence what effects the adoption of our recommendations would have on judges' retirement behaviour.

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[331] This total is based on Ontario government figures for the current number of judges on the Provincial Court: 210 judges; 21 Senior Judges; 2 Associate Chief Judges, and 3 Chief Judges. The judges' associations' figures are lower for judges and senior judges; those numbers, if correct, would produce a slightly smaller total.

We offer the following considerations to put the issue of expense in perspective.

First, we have emphasized throughout this report that the Provincial Court should be regarded as an independent branch of government and that its compensation system should be structured in a way that maximizes its judges' independence. One of the key structural changes we have proposed in recognition of judicial independence is that all the compensation Provincial Court judges receive from Ontario government revenues be paid from the Consolidated Revenue Fund, not from the Attorney General's annual appropriations. The Ontario government has already agreed in principle that judges' salaries should be a charge on that fund.[333] One important effect of any such recognition is that the cost of remunerating Provincial Court judges will be spread across the whole of the Ontario government, not sustained uniquely by the Ministry of the Attorney General. This is as it should be for an independent branch of government. That means, however, that the proper context in which to evaluate the increase in costs that will result from adopting our recommendations is not that of the budget of the Attorney General's ministry but that of the total expenditures for the Ontario government for the year. Seen against that background, the increase in cost, whatever its full amount, will be small.

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[332] The quotation we obtained for an independent actuarial valuation of the cost implications of our pension recommendations was many times the amount of this Committee's entire budget for consultants. We simply could not afford an independent expert appraisal.

[333] See note 182 above and the text surrounding it.

Second, it is well to remember that Provincial Court judges' remuneration has not been adjusted significantly for a number of years. Since at least 1980 it has not kept up with inflation. In recent months the government has moved to rectify the salary shortfalls of the Crown Attorneys, the heads of provincial tribunals and certain other groups. Provincial Court judges' compensation is no less deserving of rectification.

Finally, there is evidence that the people of Canada think sufficiently highly of the justice system to be willing to maintain its quality, whatever the cost. In its submission to us, the Canadian Bar Association provided a 1987 Environics poll showing public issues toward justice issues in Canada.[334] According to the results of that survey, ninety-six per cent [of Canadians] agree that maintaining a good [justice] system is critical, despite the costs and 80 per cent agree that the justice system is a good use of taxpayers' dollars, compared to other ways the government spends money. . . Maintaining a good system, regardless of the costs, is important to Canadians in all demographic groups.[335]

If, as we have attempted to show, our recommendations are important to maintaining and enhancing the quality of justice in Ontario, there is reason to believe that the people of the province will be prepared to endure the additional costs of implementing them.

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[334] Survey of Public Attitudes Toward Justice Issues in Canada, Environics Research Group Ltd., June, 1987. The survey was based on interviews with 1522 Canadians between December 15, 1986 and January 7, 1987. Subjects canvassed included "general perceptions of the Canadian justice system and specific attitudes toward divorce, impaired driving, prostitution, sexual assault, legal aid, victims of crime and communications or information on the law": ibid., at p. 1.

[335] Ibid., at p. 2.

F. PART-TIME SERVICE ON THE PROVINCIAL COURT

Under present law there is provision for three different kinds of part-time service in the Provincial Court. This circumstance in itself is unfortunate: it imparts confusion to the Provincial Court judges' compensation regime.

Pursuant to s. 53(1) of the Courts of Justice Act, 1984, Provincial Court judges are required to devote their whole time to their judicial duties "except as authorized by the Lieutenant Governor in Council." Cabinet may, in other words, authorize certain appointees to continue the practice of law while serving as full-fledged Provincial Court judges. According to O.Reg. 228/85, any such judges are to be paid $47,086 per year for their judicial services and are to receive none of the benefits provided to full-time judges. At present there are no Provincial Court judges of this description but the statutory provisions remain.

For reasons already given at length, we consider both such permission and the discretion to award it incompatible with an independent judiciary. We believe that Provincial Court judges who have not retired from the court should be required to serve on a full-time basis. **We recommend that O.Reg. 228/85 be revoked, and that the Courts of Justice Act, 1984 be amended to prohibit the part-time practice of law by judges appointed to the Provincial Court.**

The second group of part-time judges for which there is provision comprises those judges who retired from full-time service and who were reappointed before July 1, 1984 to serve on a part-time basis. Judges in this group who were receiving PSSA superannuation allowances before July 1, 1984 are entitled to continue receiving equivalent income continuity payments[336] and to be paid on a *per diem* basis for their work as judges. The current *per diem* payment to judges who work part-time on this basis is $264.50.[337] Judges in this group who work on this basis receive few of the other benefits provided to full-time judges.[338] There are two judges still serving on these terms.

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[336] O.Reg. 332/84, s. 41(1).

[337] Regulation 811, R.R.O. 1980, s. 2a, as amended by O.Reg. 61/88.

The third arrangement applies to judges who begin serving part-time on or after July 1, 1984 and to any judges in the second group who prefer to be remunerated for their part-time service on this basis. These part-time judges are paid a salary (not a per diem) that is the same percentage of the salary of a full-time judge of equal rank as their service is of full-time judicial service;[339] they also receive most of the other benefits of full-time judges. Judges who begin part-time service on these terms after having met the basic service requirement for pension entitlement receive additional pension credit for each year of part-time service in which the Chief Judge certifies that they served at least 50% of full time;[340] so do judges appointed at age 60 or later whose part-time service begins after they reach the age of 70.[341] Survivor benefit contributions continue to be deducted from the salaries of the judges in this group; they do not begin receiving income continuity payments until they leave office entirely.

The judges' associations mentioned two major problems with this third -- and now primary -- arrangement. First, the judges who elect to work part-time for part-time salary are treated for staffing purposes as if they continued to serve full-time; they are not ordinarily replaced by new full-time appointees. The result is a net reduction in the number of judicial hours available to deal with the continuing flow of cases; this puts extra pressure on the three Chief Judges, who must ensure that courtrooms are utilized and all cases heard. By contrast, retired judges who still sit on a per diem basis can be replaced with full-time judges; any time they spend thereafter on the bench is time in addition to the service provided by the full-time judges. Per diem judges therefore increase the Chief Judges' flexibility in scheduling.

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[338] O.Reg. 332/84, s. 40(3); Regulation 811, R.R.O. 1980, as amended, s. 10.

[339] Regulation 811, R.R.O. 1980, as amended, ss. 2b, 2c.

[340] O.Reg. 332/84, s. 7(a).

[341] O.Reg. 332/84, s. 4(5)(a).

Second, the reduced service option is simply not very attractive to sitting judges. Rarely is part-time service of interest to any judges except those who have reached retirement age; by that time, they will, for the most part, be eligible under present rules for income continuity payments equalling at least 45% of their salaries. There is little incentive to work half-time, for example, for the sake of the extra 5% of salary they could earn by doing so.

These two factors, taken together, no doubt account for the fact that no Provincial Court judges now take advantage of the reduced service option; very few have done so since it became available. The Ontario government, in its final submission, has acknowledged that the present arrangement is not working.

We agree. **We recommend that all Provincial Court judges who retire on or after July 1, 1984 be eligible, subject to ordinary approval requirements for overage appointments,[342] for reappointment to the court on a part-time basis. All such reappointed judges who have qualified at retirement for receipt of income continuity payments should be entitled to receive such payments notwithstanding their reappointments. Reappointed judges should perform such judicial duties as the Chief Judge, in his or her discretion, assigns, and should be paid for the performance of such duties on a per diem basis. We recommend further that Provincial Court judges no longer have the option of serving on a part-time basis for a proportion of full-time salary.**

G. TAX RELIEF FOR NEW JUDGES

Newly appointed judges often face a serious cash flow problem in the two years following their appointment to the bench. The problem stems from the substantial income tax payments that may be required in those two years with respect to professional income earned prior to appointment. The problem is often compounded by

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[342] See Courts of Justice Act, 1984, s. 54.

> actual or deemed dispositions that are unavoidable when a new judge withdraws from practice. Previously untaxed professional income would include not only professional income for the year, but also earnings from the last fiscal year-end to the date of appointment . . . , unbilled work in progress . . . and the 1971 accounts receivable reserve. Taxable capital gains and recaptured capital cost allowance on assets deemed disposed of and taxable capital gains on the disposition of the partnership interest may also result in a substantial income inclusion for tax purposes. Since these inclusions are added to judges' salaries, they are effectively taxed at the highest tax rate. The tax payments may, in some cases, exceed the net remuneration received by the judge.[343]

These remarks from the Guthrie Report summarize the possible adverse income tax consequences that face a lawyer in private practice considering accepting a federal judicial appointment.[344] A number of those who appeared before us assured us that the same disincentives face lawyers offered Provincial Court appointments. A number of highly qualified lawyers may be declining such offers merely because of the heavy one-time income tax burden that would result from the transition.

After reviewing a number of possible ways of reducing the immediate income tax impact of a judicial appointment, the Guthrie Commission recommended the one it found most reasonable. It proposed that all the gains and dispositions that flow, or are deemed to flow, from the winding up of the newly appointed judge's private practice be included in his or her income for taxation purposes, but that the judge be able to spread the taxation on those gains over fifteen years. On this proposal, only 1/15 of the total amount of the gain would have to be reported as income in the year the transition took place; an additional 1/15 of the total would have to be reported as income in each of the fourteen subsequent taxation years. Special rules would apply if the judge retired or died before the exhaustion of this fifteen year period.[345]

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[343] Guthrie Report, note 193 above, at p. 26.

[344] People appointed to the bench from salaried employment -- as government counsel, Crown Attorneys, lawyers at community clinics, in-house corporate counsel, or even private firms' employed associates -- do not confront this array of tax disincentives.

The judges' associations have urged that Provincial Court judges be given the benefit of this recommendation, as well.

To date the federal government has not implemented the fifteen-year reserve the Guthrie Commission recommended; we have no information that would indicate whether it ever intends to do so. There is nothing the Ontario government or this Committee can do to hasten an affirmative federal response to this concern. There is, therefore, no useful recommendation we can make upon this subject.

We do, however, share the judges' associations' view that income tax relief arrangements for newly appointed judges should, if implemented at all, enure to the benefit of all judges, whether they are federally or provincially appointed. If the federal government does adopt the Guthrie Commission's recommendation on behalf of the judges it itself appoints, we trust the Ontario government will urge it to extend the benefits of the fifteen-year reserve to the judges appointed by the provincial governments.

H. CONSOLIDATION OF THE REGULATIONS

Having worked closely for more than six months with the statutory and regulatory provisions that pertain to Provincial Court judges' remuneration, we could not help noticing how many places one has to look in order to canvass all the relevant provisions. Regulation 811, as amended, now prescribes Provincial Court judges' entitlements to salary, vacation, special purpose leave, extended leave and the incidental allowance. O.Reg. 332/84, as amended, prescribes the retirement income plan, the survivor benefits and the entitlements to sick leave, maternity leave and long term income protection insurance; it also incorporates by reference a number of provisions from the general regulation under the Public Service Act. Finally, O. Reg. 228/85 deals with judges authorized by the Lieutenant Governor in Council to practice law while serving as judges. These provisions are all in addition to the provisions in the Courts of Justice Act, 1984 that pertain to the Provincial Court.

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[345] Guthrie Report, note 193 above, at pp. 27-29.

We have recommended that these provisions be changed in a number of ways, both substantive and structural. We have recommended, for instance, that the mechanism of incorporation by reference no longer be used to help define the benefits conferred on Provincial Court judges and that O.Reg. 228/85 be revoked. Even if these recommendations are accepted, however, there will still be at least two separate regulations that deal with Provincial Court judges' remuneration. We see no good reason for such multiplicity; it would be much more convenient if all the relevant provisions that are to be prescribed by regulation were to appear in one place. **We recommend, therefore, that all provisions in regulations that pertain to the compensation of Provincial Court judges be consolidated into a single master regulation. We recommend further that updated copies of that master regulation be provided to every newly appointed Provincial Court judge and from time to time to the other incumbent Provincial Court judges.**

I. MASTERS AND FAMILY LAW COMMISSIONERS

We were informed that, by agreement with a former Attorney General, the Supreme Court Masters receive remuneration and benefits at the same rates and upon the same basis as Provincial Court Judges. In view of the work they perform in our judicial system they are clearly judicial officers, and in view of the complexity and the monetary value of the issues that come before them, it is appropriate that this equivalence continue.

The role of the Family Law Commissioners is less clear to us. However, we were persuaded that much of the work they perform is work normally performed by a judicial officer and we trust that they will not be overlooked by the Government merely because of their small numbers.

J. COUNSEL FEES FOR THE JUDGES' ASSOCIATIONS

At the end of its 1984 report recommending a separate pension plan for Provincial Court judges, the predecessor to this Committee recommended that the Ontario government "pay one half of the fees and disbursements that are directly related to the [judges' associations] submissions to the Ontario Provincial Courts Committee in respect of the pension issue[,]" because the "pension problem was a particularly complicated and time-consuming issue." The Committee took pains to emphasize, however, that its "recommendation applies only to the pension issue and that, in future, in respect of all matters, the judges should be expected to pay the full costs of any counsel or other advisers that they choose to retain."[346]

In his final argument before the present Committee, Mr. French, counsel for the judges' associations, cited these passages to us and requested that we recommend that the government "fund a substantial portion of the fees and disbursements incurred by the Judges in the course of their involvement before the Committee."[347] He asked that we consider but not be bound by our predecessors' remark that the judges' associations should not expect further funding. He stressed that the judges' associations' participation before us served not only the obvious personal interests of the judges but a wider public interest in an independent judiciary. And he invited us to find that Provincial Court judges' participation in the proceedings before us came within the guidelines for the funding of intervenors in the public inquiry process.

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[346] Report of the Provincial Courts Committee, March 27, 1984, p. 10.

[347] Reply of the Provincial Court Judges to the Final Submission of the Government of Ontario to the Ontario Provincial Courts Committee, July 22, 1988, p. 19.

In response, the Ontario government took the position that the Provincial Courts Committee lacks jurisdiction to recommend that the government pay a portion of the costs of participation incurred by the judges' associations. Quite apart from that, it said, such a recommendation in these circumstances would be inappropriate, because the previous Committee had put the judges' associations on notice that no further funding was to be expected. If the judges' associations wished it to pay a portion of their costs, the government added, they should have raised the issue during the discussions that led to the July 21, 1987 agreement[348] that reestablished this Committee.

We take no position on the jurisdictional issue raised by the government. We are satisfied that this is not a proper occasion on which to recommend that the government help defray the judges' associations' costs. The Committee's report of March 27, 1984 made it clear that the judges' associations could not expect subsequent recommendations that their participation be subsidized. Given that pronouncement, it was reasonable to expect that they would govern themselves accordingly. The government may choose on its own to assist them with their costs, but we are not recommending that it should do so.

V. CONCLUSIONS

In view of the long delay between the recommendations of our predecessor committee in 1981 and their rejection in 1985 and in view of the manner in which the purchasing power of Provincial Court Judges' salaries has declined in this decade, we trust that the Government will move quickly to implement our recommendations regarding remuneration and benefits. Having done so, we urge the Government also to consider seriously the structural recommendations we have proposed. It is our opinion that a more independent Provincial Court is required in our society and this Government should take the required steps.

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[348] Appendix C to this report.

APPENDICES

APPENDIX "A"

COURTS OF JUSTICE ACT, 1984, ss. 87-88

Section 87

87.--(1) The Lieutenant Governor in Council may make regulations,

(a) specifying the returns to be made by provincial courts;

(b) fixing the remuneration of provincial judges;

(c) providing for the benefits to which provincial judges are entitled, including

(i) leave of absence and vacations,

(ii) sick leave credits and payments in respect of such credits,

(iii) pension benefits for provincial judges and their surviving spouses and children,

and for the transfer or other disposition of benefits in respect thereof to which persons appointed as provincial judges were entitled under the Public Service Act or the Public Service Superannuation Act at the time of their appointment;

(d) prescribing the duties of the clerks and employees of provincial courts or of any class of such employees;

(e) prescribing territorial divisions for the Provincial Court (Civil Division) and the place within each division where the court office shall be located;

(f) designating areas in which the maximum claim or value of $1,000 set out in subsection 78(1) shall be $3,000 in each instance and not as set out therein;

(g) providing for the retention of fees by clerks, bailiffs and referees of the Provincial Court (Civil Division) who are not civil servants under the Public Service Act and designating areas where clerks, bailiffs and referees of the Provincial Court (Civil Division) may be appointed to a position as a civil servant under that Act;

(h) providing for a system of statistical records relating to provincial courts. R.S.O. 1980, c. 398, s. 34(1); R.S.O. 1980, c. 397, s. 9; 1982, c. 58, s. 6(1)(b).

(2) Regulations made under clause (1)(c) may require judges to contribute from their salaries part of the cost of benefits and may fix the amount of the contributions.

(3) A regulation made under clause (1)(c) may modify or exclude the application of the Public Service Superannuation Act. 1983, c. 78, s. 2(1).

(4) Any regulation made under subsection (1) may be general or particular in its application. R.S.O. 1980, c. 398, s. 34(2).

Section 88

88.--(1) There shall be a committee to be known as the Ontario Provincial Courts Committee, composed of three members, of whom,

(a) one shall be appointed jointly by the Provincial Judges Association (Criminal Division), the Ontario Family Court Judges

Association and the Provincial Court Judges Association of Ontario (Civil Division);

(b) one shall be appointed by the Lieutenant Governor in Council; and

(c) one, to be the chairman, shall be appointed jointly by the bodies referred to in clauses (a) and (b).

(2) The function of the Ontario Provincial Courts Committee is to inquire into and make recommendations to the Lieutenant Governor in Council respecting any matter relating to the remuneration, allowances and benefits of provincial judges, including the matters referred to in clauses 87(b) and (c).

(3) The Ontario Provincial Courts Committee shall make an annual report of its activities to the Lieutenant Governor in Council.

(4) Recommendations of the Committee and its annual report under subsections (2) and (3) shall be laid before the Legislative Assembly if it is in session or, if not, within fifteen days of the commencement of the next ensuing session. 1983, c. 78, s. 2(2).

Ontario
Executive Council

Order in Council

APPENDIX "B"

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that

WHEREAS the Ontario Provincial Courts Committee is established under section 88 of the Courts of Justice Act, 1984, S.O. 1984, c. 11, and is composed of three members:

(a) one appointed jointly by the Provincial Judges Association (Criminal Division), the Ontario Family Court Judges Association and the Provincial Court Judges Association of Ontario (Civil Division);

(b) one appointed by the Lieutenant Governor in Council; and

(c) one, to be the Chairman, appointed jointly by the bodies referred to in clauses (a) and (b);

AND WHEREAS the judges' associations have appointed Mary Eberts, Barrister and Solicitor, Toronto, as a member of the Committee;

AND WHEREAS the government and the judges' associations desire that Gordon F. Henderson, Barrister and Solicitor, Ottawa, be appointed as Chairman of the Committee;

.....2

NOW THEREFORE:

1. Gordon F. Henderson, Barrister and Solicitor, Ottawa, be appointed as Chairman of the Ontario Provincial Courts Committee until December 31, 1989 or until a successor is appointed;

2. William C. Hamilton, Barrister and Solicitor, Guelph, be appointed as a member of the Ontario Provincial Courts Committee until December 31, 1989 or until a successor is appointed;

3. All members of the Ontario Provincial Courts Committee be paid remuneration at the rate of $800.00 for each day that they are engaged in the work of the Committee and all members of the Committee be reimbursed in accordance with the rules of the Management Board of Cabinet for their actual travelling and living expenses incurred while engaged in the work of the Committee;

4. Orders-in-Council O.C. 3269/81 and O.C. 1456/85 be revoked.

Recommended ______________ Concurred Murray J Elston
Attorney General Chairman

Approved and Ordered Feb 18, 1988 ______________
Date Lieutenant Governor

O.C. 439/88

APPENDIX "C"

Ontario

Office of the
Minister

Bureau
du Ministre

Ministry of
the Attorney
General

Ministère
du Procureur
général

18 King Street East
Toronto, Ontario
M5C 1C5

18 rue King, est
Toronto, Ontario
M5C 1C5

416/965-1664

July 21, 1987

Paul F. French, Esq.
Hughes, Amys
Barristers and Solicitors
Royal Bank Tower
200 Bay Street
24th Floor
Toronto, Ontario
M5J 2P6

Dear Mr. French:

Further to my letter of July 7, 1987, and the intervening discussions you have had with my officials, I would like to outline the proposal that I will place before Cabinet if it has the support of the Provincial Judges. That proposal consists of the following elements:

1. The Provincial Courts Committee as provided for in the Courts of Justice Act should be properly constituted by the appointment forthwith of the judges and the government representatives together with a chairman. Neither judges nor public servants shall be appointed to the Committee.

2. We would agree that the members of the Committee would be appointed for a term of approximately three years and would be paid an honorarium determined by the Chairman of Management Board, plus their reasonable expenses, and that within six months of January 1, 1990 and every three years thereafter the members would be appointed for three year terms.

3. The Committee would be entitled to retain and pay counsel, consultants and staff of its choosing, subject to the approval of expenses by the Chairman of Management Board.

4. We would agree that within six months after its appointment, the Committee shall make appropriate inquiries into the remuneration allowances and benefits of provincial judges, conduct such hearings and receive submissions from interested individuals or groups as it considers necessary, and issue a report to the Chairman of Management Board.

5. We would agree further that the provincial judges and the Ontario government would have the right to make submissions to the Committee in relation to judicial remuneration, allowances and benefits. Submissions would be in writing, with full disclosure between the parties, and the right to submit reply briefs. Both the judges and the government would have the right to make oral submissions to the Committee. The Committee would meet in private, with the respective positions and arguments of the judges and the government not being made public, other than to the extent to which reference might be made to them in the Committee's reports. Representatives of the Judges' Association and the government would have the right to be present during the reception by the Committee of any briefs or submissions.

6. The report of the Provincial Courts Committee must be tabled in the Legislature and referred to the Standing Committee on Administration of Justice, as provided in s.88(4) of the Courts of Justice Act.

7. Following receipt of a report of the Committee and its tabling and consideration by the Standing Committee on the Administration of Justice, the government would table legislation establishing the salaries of provincial judges as of April 1, 1987. The salaries would be a charge on the consolidated revenue fund. The views of the Provincial Courts Committee on the proper levels of remuneration, allowances and benefits for provincial judges would be recognized as recommendations to be given the fullest consideration and very great weight by the government in the decision-making process.

8. The Committee would also report on a formula for the provision of salary increases for each year in which the salaries of the provincial judges were not raised by legislation. Guided by that recommendation to which would be given the fullest consideration and very great weight, we would include in the legislation establishing the judges' salaries a formula for those years.

9. Also included in the legislation setting salaries would be amendments giving general effect to the procedures set forth in paragraphs one through seven where such is not already provided for in the statute or the procedure of the Legislative Assembly. This legislation would also change the name of the Provincial Court Committee to the Provincial Courts Commission.

If this proposal is acceptable, I would request that you endorse it as provided below.

I look forward to hearing from you at your earliest convenience.

Yours very truly,

IAN SCOTT
Attorney General

Agreed to by:

Paul French Counsel for
the Association of Provincial
Criminal Court Judges, the
Ontario Family Court Judges
Association and the Ontario
Provincial Civil Division
Judges Association

APPENDIX "D"

Ontario

ONTARIO PROVINCIAL COURTS COMMITTEE

The Ontario Provincial Courts Committee is established under section 88 of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11. Its mandate is to inquire into and make recommendations to the Lieutenant Governor in Council respecting any matter relating to the remuneration, allowances and benefits of Provincial Court Judges.

The Committee invites written submissions from interested persons on matters within the Committee's mandate. Written submissions must reach the Committee at the address given below by March 7, 1988. Five copies of a submission are required.

A person intending to file a written submission may also request an opportunity to make an oral presentation to the Committee. The Committee must be notified by March 7, 1988 of a person's desire to make an oral presentation and any such request will not be considered if the person has not filed a written submission by March 7, 1988. Persons requesting an oral presentation will be notified of time and place. The Committee proposes to hear oral presentations, if required, in the following cities on the following dates:

OTTAWA	March 14, 1988
LONDON	March 15, 1988
SUDBURY	March 21, 1988
THUNDER BAY	March 22, 1988
TORONTO	March 30 and 31, 1988

Ontario Provincial Courts Committee
3rd Floor
10 King Street East
Toronto, Ontario
M5C 1C3

Gordon F. Henderson
Chairman

APPENDIX "E"

BRIEFS AND SUBMISSIONS TO THE ONTARIO PROVINCIAL COURTS COMMITTEE

Pursuant to paragraph 5 of the July 21, 1987 agreement (Appendix "C" above), the submissions we received from the judges' associations and the Ontario government are not to be made public, except where the Committee refers to them in this report. We consider all the submissions we have received to be subject to those same constraints. Anyone interested in obtaining copies of briefs or submissions to this Committee should contact those who submitted them.

The following individuals and organizations made submissions to the Provincial Courts Committee:

Professor Carl Baar (Toronto)

Senior Judge Paul R. Belanger (Ottawa)

John R. Belleghem, Q.C. (Oakville)

Master Edward R. Browne (London)

Canadian Association of Provincial Court Judges (Burnaby, B.C.)

Canadian Bar Association Ontario (Toronto)

Judge Michael H. Caney (Toronto)

Judge R. D. Clarke (Thunder Bay)

County and District Law Presidents' Association (Sudbury)

County of Carleton Law Association (Ottawa)

Criminal Lawyers' Association (Toronto)

Defence Counsel Association of Ottawa (Ottawa)

Judge Lorenzo Di Cecco (Toronto)

District of Kenora Law Association (Kenora)

James Eccles (Thunder Bay)

Family Court Lawyers Association for London and Middlesex County (London)

Family Law Commissioners (Toronto; Ottawa)

Judge Maurice H. Genest (London)

Government of Ontario (Toronto)

Paul Gordon (Thunder Bay)

Paul E. Greenberg (Cambridge, Mass.)

Halton County Law Association (Oakville)

Hamilton Criminal Lawyers' Association (Hamilton)

Hamilton Law Association (Hamilton)

Judge D. T. Hogg (Toronto)

Judge J. C. Horwitz (Ottawa)

Judge G. R. Kunnas (Thunder Bay)

Randall W. Lalande and John Keast (Sudbury)

London Criminal Lawyers' Association (London)

Masters Association of Ontario (Toronto)

Judge C. Russell Merredew (Pembroke)

Senior Judge G. E. Michel (Sudbury)

Middlesex Law Association (London)

Elizabeth Morrison (Burlington)

Norman A. Peel, Q.C. (London)

Peel Law Association (Brampton)

Provincial Judges Association (Criminal Division), Ontario Family Court Judges Association, and Provincial Court Judges Association of Ontario (Civil Division)

Dr. A. K. Ray (Gloucester)

Senior Judge R. T. Runciman (Sudbury)

Master David H. Sandler (Toronto)

Judge David G. Scott (Newmarket)

Shades Mill Law Association (Cambridge, Ont.)

Judge Harold J. Slater

Sudbury District Law Association (Sudbury)

Thunder Bay Law Association (Thunder Bay)

Judge Pamela A. Thomson (Toronto)

Robert C. Topp (Sudbury)

Waterloo Law Association, Court Liaison Committee (Kitchener)

Roger Yachetti (Hamilton)

Judge Anton Zuraw (Hamilton)

APPENDIX "F"

REFUNDING PUBLIC SERVICE SUPERANNUATION ACT CONTRIBUTIONS: SPECIAL CASES

Before the implementation of the Provincial Judges Benefits Regulation on July 1, 1984, Provincial Court judges participated in the Public Service Superannuation Plan, the pension plan established for Ontario public servants. As members of that plan they were required to contribute a total of 7% of their salaries to the cost of their pension benefits: 6% to the Public Service Superannuation Fund ("PSSF"), and 1% to the Superannuation Adjustment Fund to pay for the indexation of their pensions to the cost of living. The 6% figure was reduced by the amount a judge was required to contribute to the Canada Pension Plan. These contributions were matched by contributions from the Ontario government. Upon retirement, a judge was entitled to a pension equalling 2% of his or her best five years' earnings for each year of contributory service to the plan, to a maximum of 35 years (or 70%). Within that regime, the judge had the option of purchasing additional service credit in the PSSF by making voluntary contributions to the plan in respect of years spent in other sorts of designated service (military service, for example) or, if he or she had service credit in another pension plan whose credits were portable with those in the PSSF, by transferring into the PSSF employer and employee contributions made to that plan in respect of their service.

When the Provincial Judges Benefits Fund ("PJBF") was established on July 1, 1984, all the PSSF contributions that had been made in respect of judicial service -- those of the judges and those of the government -- were transferred into the PJBF, together with the interest they had accumulated. Except for those transferred contributions, no further contributions were required of Provincial Court judges toward the cost of their own retirement benefits. In return for their transferred contributions, the judges who were appointed before July 1, 1984 were guaranteed that their pension entitlement at retirement would not be less than it would have been if they had continued to participate in the previous plan. Those judges, in other words, receive a pension based either on the rules in the current plan for Provincial Court judges or on the rules set out in the PSSA, whichever is to their advantage at the time they retire.

For the vast majority of judges in that group, the pension the current plan provides will be the more generous. Only in two situations will it be otherwise. A judge who leaves office without having met the minimum qualifications for an income continuity payment under the current plan may nonetheless have qualified for a PSSA-equivalent pension under the more liberal PSSA rules.[1] And a judge who accumulates enough years of service can earn a pension equal to a sufficiently high percentage of his or her best five year average salary to exceed the percentage of final salary that the current plan for the judges provides. Estimates that we have received have placed the break-even point between the two computations at anywhere between 23.75 and 28 years of service. The actual break-even point in a given year will depend on the rate at which Provincial Court judges' salaries have risen during the five previous years: the steeper the rate of increase, the greater the number of years of service required to make the PSSA computation become the more generous. Implementation of our earlier recommendations as to salary and retirement income would increase significantly the length of service required to benefit from the minimum guarantee of PSSA equivalency.

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[1] Under the current plan, judges appointed at age 59 or younger must be at least age 65, and their years of age plus years of service must equal or exceed 80. Judges appointed at age 60 or later must serve until at least age 70. (O.Reg. 332/84, as amended, ss. 3, 4.) To qualify for a superannuation allowance under the PSSA, one must reach age 65 with 10 years' service, reach age 60 with 20 years' service, or have sufficient years of age plus years of service to equal 90, whichever comes first. PSSA annuities are available (at different ages, depending on the circumstances) to anyone with 10 years' contributory service. (PSSA, ss. 11, 13.) Annuities are calculated in the same manner as superannuation allowances, except that their amounts are actuarially reduced by 5% for each year of age less than 65 the contributor is when the payments commence. (PSSA, s. 14.)

All this means, however, that those transferred pension credits are of little real value to the judges who earned them. Unless a judge who made contributions comes within one of the two exceptional groups described above, her transferred PSSF contributions purchase her no increment in pension benefit for any years of service beyond the fifteenth. And if she accumulates 15 years of judicial service on or after July 1, 1984, her transferred PSSF contributions will earn her no additional credit. In an important sense, therefore, these judges, at present, have had to pay something for nothing.

The previous Provincial Courts Committee recognized this predicament and went some distance to try to deal with it fairly. On June 25, 1984 the Committee recommended that judges who had made voluntary contributions to the PSSF in respect of other service be permitted, at their option, to claim a refund, with interest, of those contributions from the PJBF, precisely because, in all likelihood, those additional contributions would earn them no additional benefit. Only the judges' mandatory contributions, it said, should be required to stay in the PJBF.[2] On September 9, 1985 it recommended that the employee portion of any contributions judges may have transferred into the PSSF from earlier pension plans be available for refund, with interest, to those judges. Acceptance of a refund, of course, would reduce concomitantly the amount of service credit a judge could count toward retirement. Both these recommendations were implemented.[3]

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[2] Report of the Provincial Courts Committee, June 25, 1984, p. 1. The Committee also recommended that judges be entitled to refunds, with interest, of the contributions they had made to the Superannuation Adjustment Fund, because those contributions would not ordinarily be used to index judges' retirement benefits under the new pension plan: Ibid., p. 2. Sections 44(2)-(6) of O.Reg. 332/84, as amended, implemented this latter recommendation.

[3] O.Reg. 332/84, as amended, ss. 44(7)-(16). The deadline for claiming refunds of voluntary PSSF contributions was July 1, 1985; January 1, 1988 was the deadline for judges to claim refunds of employee contributions transferred into the PSSF from other plans.

These measures, however, were not enough to dispel all dissatisfactionwith the transfer of contributions. Three different judges made submissions to this Committee with respect to this issue. We shall deal with these submissions in turn.

1. Refund of All Judges' PSSF Contributions

One submission urged us to recommend that all Provincial Court judges be given the option of taking a refund, with interest, of all the contributions they made to the PSSF, irrespective of whether those contributions were voluntary or compulsory. Judges, according to this submission, in no sense accepted or agreed to the transfer of their PSSF contributions into the PJBF; given that those contributions rarely earn them any additional pension benefit under the current scheme, there is no justification for the government having the benefit of them. Not to refund them, on this view, would discriminate against this group of judges. Judges appointed on or after July 1, 1984 will have made no contributions to the cost of their own pension benefits, yet in almost all cases they will benefit just as much from the plan as the judges whose PSSF contributions were transferred into the PJBF. If the current retirement income plan were sufficiently generous, this submission continued, such discrepancies could be tolerated. Because it is not more generous, however, the Ontario government ought, at a minimum, on this view, to do one of three things: (i) allow longer service as credit toward retirement at full pension before age 65; (ii) allow greater retirement incomes to those with longer service, or (iii) allow the judges' PSSF contributions to be treated as contributions to a separate deferred pension.

After careful consideration, we have decided not to recommend a general refund. It would cost about $10 million to refund with interest all the unrefunded transferred PSSF contributions made by Provincial Court judges before July 1, 1984.[4] Given the cost to the government of our other recommendations, we cannot, in all the circumstances, justify that additional burden. Besides, all defined benefit plans necessarily benefit some of their members at other members' expense; the only way to ensure that all receive exactly what they pay for is to substitute a money purchase plan. No one before us has suggested that we recommend such a change.

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[4] According to the March 31, 1986 and March 31, 1987 annual reports of the Provincial Judges Benefits Board, a total of $19,420,219 in PSSF contributions was transferred into the

We have, however, sought in making our general pension recommendations to answer to some extent the concerns expressed in this submission. We have recommended a 10% general increase in the base percentage of final salary on which the income continuity payments ought to be calculated; that, together with the salary increase we have proposed, will make the retirement income scheme significantly more generous. We have also recommended a way of giving additional pension benefit to judges who complete more than 15 years of service before age 65, and have recommended that such benefit accrue to judges who choose to take early retirement. Finally, we have made it express that all the service credit purchased by unrefunded PSSF contributions transferred into the PJBF should count toward this additional benefit, whether or not the credit is in respect of judicial service. In our view, these recommendations accommodate this submission adequately.

2. Employer Contributions Transferred In from Other Plans

Before his appointment to the Provincial Court (Criminal Division) in 1979, one of the judges who wrote to us spent several years as a federal Crown Attorney. By the time he left the service of the federal government, he had accumulated enough contributory service in the Federal Superannuation Plan

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PJBF. Allowing for refunds of refundable contributions ($1,636,578 in 1985-86; $115,000 in 1986-87, including contributions refunded from the Superannuation Adjustment Fund) and assuming that the judges' own portion of those contributions was roughly 50%, it seems likely that the amount that remains of the judges' PSSF contributions would, with interest, come to roughly $10 million.

to have earned a deferred annuity from that plan, commencing at age 65. Both his and his employer's contributions had, in other words, vested. Upon his appointment to the bench, however, he elected to transfer into the PSSF the employer and employee contributions to his credit in the Federal Superannuation Plan, pursuant to a pension portability agreement between the Ontario government and the government of Canada. These transferred contributions purchased him eleven years and seven months' service credit in the PSSF. These contributions, along with the PSSF contributions he made as a judge, were transferred into the PJBF on July 1, 1984.

Pursuant to section 44(11a)-(11e) of the Provincial Judges Benefits Regulation, this judge was given the option, until January 1, 1988, of obtaining a refund, with interest, of all or any part of the contributions he himself had made to the federal plan; the cost of exercising that option was that his service credit in the PJBF would be reduced concomitantly. He would, that is, be given no credit for the amount represented by the transferred federal government contributions that remained in the fund. The judge declined the offer because it did not include the employer contributions he had also transferred into the PSSF.

The omission of employer contributions was deliberate. In its report of September 9, 1985, the Provincial Courts Committee recommended that pension plan contributions transferred into the PSSF from other pension plans be treated as voluntary contributions and made refundable, because "[a]n individual who decided to transfer his contributions lost the refund he would otherwise have been entitled to."[5] The Committee added, however,

> When a judge transferred contributions from a former pension plan to the [PSSF], the employer's contributions to the former plan were also transferred. We would like to make clear that the recommendation made above only covers a refund of the judge's own contributions. There should be no refund of the transferred employer contributions, since, at the time of the judge's appointment to the bench, he could not

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[5] Report of the Provincial Courts Committee, September 9, 1985, at p. 2.

> have received a refund of his former employer's contributions.[6]

The regulation made into law the Committee's recommendation.

In our opinion, however, this rationale does not answer this judge's specific concern. At the time of his appointment to the Provincial Court, he had already earned a deferred annuity in the Federal Superannuation Plan; had he not transferred his service credits into the PSSF, he could, even now, have begun collecting that annuity at the age of 65. His entitlement, therefore, was not limited to a refund of his own contributions to the federal plan; he had earned the benefit of his employer's contributions too. Had he been aware, at the time he faced the decision, that his transferred contributions would earn him no additional pension benefit as a Provincial Court judge, it would have been unreasonable for him even to consider the transfer seriously.

These circumstances warrant recognition. We believe that our recommendation on page 84 of the report (number 8 in the Summary of Recommendations) meets the concern expressed. If, however, the government does not implement that recommendation, **we recommend that all Provincial Court judges whose PSSF contributions transferred into the PJBF included contributions transferred into the PSSF from other pension plans and whose pension rights had vested in those other pension plans be given the option, for twelve months from the date this recommendation is implemented, of recovering, with interest, all or any part of the unrefunded employer and employee contributions transferred into the PSSF from the other pension plan. Any transferred employer and employee contributions left unrefunded with respect to a given judge should be credited to that judge's service as though they had been contributed by employer and employee in equal shares.[7] The onus of establishing that a judge had vested rights in another plan should rest with the person claiming the refund in respect of the judge.**

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[6] Ibid.

[7] According to s. 10(1) of the PSSA, the Ontario government is to contribute to the PSSF amounts equivalent to the amounts contributed by employees.

3. Pre-Appointment PSSF Contributions

At the time the third judge who wrote to us was appointed to the Provincial Court in 1982, he had completed ten full years as an assistant Crown Attorney. His contributions to the PSSF during that ten year period were enough to have earned him a deferred annuity under the PSSA.[8] Because at the time he was not yet 45 years of age, however, his PSSF contributions were not yet locked in;[9] that meant that if he had left the plan, he could have claimed a refund, with interest, of those contributions.[10] As it was, those contributions remained in the PSSF, along with the subsequent contributions he made to the plan as a judge. As of July 1, 1984, all his PSSF contributions were transferred into the PJBF.

This judge is content that the PSSF contributions he made as a judge remain in the PJBF; his submission, however, is that he should be able to claim a refund, with interest, of the contributions he had made to the PSSF as a Crown Attorney. At present there is no provision in the regulation that would authorize a refund of contributions in these circumstances: because the judge was a member of the Ontario public service during those years, his contributions to the plan were mandatory, not discretionary.

According to information we obtained from the Ministry of the Attorney General, 21 Provincial Court judges appointed before July 1, 1984 had begun contributing to the PSSF before the dates of their appointments. Eighteen of those judges, including the judge who wrote to us, would have been able to obtain a refund of their pre-appointment contributions if they had left the plan altogether when they were appointed. Nine judges, including this judge, already had vested rights in the PSSF at the time they were appointed. A total of six judges, therefore, counting the judge who raised the matter with us, could, at the time of their appointment, either have taken a refund of their previous contributions or have taken a deferred annuity. No one was able to say how much money it would take to refund, with interest, the pre-appointment PSSF contributions made by the eighteen judges, or to transfer back, with interest, into the PSSF the employer and employee contributions of the six judges who would have been entitled to deferred annuities.

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[8] PSSA, s. 13(1).

[9] PSSA, s. 17(2).

[10] PSSA, s. 17(1).

We believe that judges in this situation should be entitled either to refunds of their pre-appointment contributions or to the deferred annuities those contributions were sufficient to purchase at the time of their appointments to the bench. If any of those judges had happened to be appointed on or after July 1, 1984, they would have had those options open to them. Similarly, if this judge had been a *federal* Crown Attorney and had elected to transfer his contributions into the PSSF on the date of his appointment, he would at least have been entitled to a refund of the contributions he himself had made to the plan from which the credits were transferred. The only reason why these options are not already open to him and the others in his position is that Provincial Court judges happened to be included in the PSSF at the time of his appointment. By that time it had been recognized for several years that that arrangement was not as it should be. The judges in this position should not be prejudiced by the length of time it took to rectify that situation.

If the government implements our recommendations on page 84 of the Report (recommendation 8 in the summary), we recommend that no refunds be allowed. If the government does not implement that recommendation, **we recommend that each Provincial Court judge appointed before July 1, 1984 who, at the time of his or her appointment, was already contributing to the PSSF in some other capacity, be given the following options for a twelve month period commencing on the date this recommendation is implemented: (i) judges whose PSSF contributions were not already locked in under *PSSA* provisions in force on the date of appointment to the bench should be entitled to a refund, with interest, of all or any part of their pre-appointment PSSF contributions; (ii) judges whose PSSF contributions were sufficient, at the time of appointment to the bench, to earn them deferred annuities under *PSSA* rules in force at that time should be entitled to direct that the employer and employee contributions made to the PSSF in respect of their pre-appointment employment be retransferred, with interest, to the PSSF for the purpose of reestablishing those annuities. Judges** who come within both (i) and (ii) should be given both opportunities.

SUMMARY OF RECOMMENDATIONS

REPORT OF THE PROVINCIAL COURTS COMMITTEE

The Provincial Court is the court of first resort for most legal disputes in the province, deciding approximately 93% of all criminal matters and 77% of all family law matters. The impact of the Provincial Court on so many Ontario residents makes it imperative that the quality of justice dispensed there be particularly high. It takes a special kind of lawyer to flourish as a judge of the Provincial Court. They are indispensible to the integrity of our justice system.

Three governing principles have directed our thinking in this report: the imperative of an independent judiciary, the presumption that professionals will perform professionally if they are treated in a professional manner, and the importance of looking at the judges' compensation package as a whole.

We affirm the surpassing independence of an independent judiciary. It is essential to the rule of law that courts, and judges, be completely separate in authority and function from all other participants in the legal system. Maintaining this fundamental principle entails many constraints and sacrifices for the individual judge; it also imposes clear obligations on government. Security of tenure, financial independence, and the institutional independence of the court must all be assured if judicial independence is to be assured. All of these elements have consequences for the compensation regime; among them is that inflation must not be permitted to bring about a de facto reduction in judges' earning power.

The principal of treating professionals as such is closely related to that of judicial independence. In our opinion, the professionalism of judges compels one to accept that each of them came to the bench with a clear appreciation of the fundamental importance of the work the Provincial Court does and with a developed disposition to fulfill his or her functions well and conscientiously.

We have sought in this report to design a compensation scheme that satisfies the third principle, namely that of creating a "complete package." The consequence of following this principle, however, is that we believe the recommendations should be received and implemented as a whole. They are as follows.

PART III

JUDICIAL INDEPENDENCE

1. We recommend that all forms of compensation payable out of provincial revenues to Provincial Court judges be paid out of the Consolidated Revenue Fund of Ontario, not out of the legislature's yearly appropriations.

2. We recommend that all the benefits, allowances and options to which Provincial Court judges are or may be entitled be codified in statute or in regulation. (See also recommendation 43 about consolidation.)

PART IV

SALARY

3. We recommend that Provincial Court judges receive annual salaries, effective April 1, 1987 of:

$105,000

4. We recommend that administrative judges receive annual salaries, effective April 1, 1987, of:

Chief Judges	$120,000
Associate Chief Judges	$115,000
Senior Judges	$112,000

5. We recommend that Provincial Court judges' salaries be adjusted regularly to keep up with inflation.

6. We recommend that the Courts of Justice Act, 1984 be amended to provide that Provincial Court judges' salaries be adjusted, effective April 1 of every year, in direct proportion to the percentage of any annual increase in the national average of the Consumer Price Index, published by Statistics Canada, from the beginning to the end of the previous calendar year. We recommend that when and if Statistics Canada publishes Consumer Price Index figures regularly for Ontario, those figures be used instead of the figures for Canada.

PENSIONS AND RELATED BENEFITS

Income Continuity

7. We recommend that the basic percentage used to calculate Provincial Court judges' income continuity payments be increased, throughout the current plan and effective April 1, 1987, by 10% of the salary earned at the time a judge retires by judges of the highest judicial rank he or she held while in office.

8. We recommend that the income continuity payment payable to a judge appointed before the age of 50 be increased, effective April 1, 1987, by 0.5% of final salary for each year of service beyond the fifteenth that the judge completes before reaching age 65. Such credit should also be given to judges who leave office before age 65 with more than 15 years of service, whether they take an immediate or a deferred pension. With respect to judges appointed before July 1, 1984, we recommend that the entire period of contributory service that stands to their credit in the Provincial Judges Benefits Fund by reason of unrefunded contributions made on their behalf to the Public Service Superannuation Fund before July 1, 1984 be treated as judicial service for purposes of this enhancement provision, whether or not the contributions were made in respect of judicial service.

Survivor Benefits

The Definition of "Spouse"

9. We recommend that section 1(j) of the Provincial Judges Benefits Regulation be amended to read as follows: "'spouse' has the same meaning as in Part III of the Family Law Act, 1986."

10. We recommend that the Provincial Judges Benefits Board-- the body that now administers the Provincial Court judges' pension scheme -- be given exclusive jurisdiction with respect to all disputes that arise from competing claims to the status of "spouse" for purposes of survivor benefits. We recommend that the Statutory Powers Procedure Act apply to hearings before the Board with respect to such disputes.

Entitlement

11. We recommend that section 31(2a) of the regulation be amended to permit Provincial Court judges who have spouses and/or children to designate, in their discretion, someone else as beneficiary of up to two-fifths of their compulsory group life insurance coverage. We recommend that the current restriction contained in s. 31(2a) continue to apply with respect to the other three-fifths of the coverage.

12. We recommend that s. 11(1) of O.Reg. 332/84 be amended to read:

> The spouse of a judge who
>
> (a) dies while in office, and
>
> (b) would have been entitled to an annual income continuity payment if he or she had ceased to hold office before dying,
>
> is entitled to an annual survivor allowance during the spouse's lifetime.

13. We recommend that O.Reg. 332/84 be amended to make it clear that no one may receive more than one survivor allowance in respect of the same judge. We recommend that the spouse of a judge who dies while serving part-time on a per diem basis receive a survivor allowance calculated on the basis of the annual income continuity payment the judge became entitled to on retirement from full-time service (s. 11 of the regulation), not on the basis of the amounts the judge would have received had he or she served full-time until age 75 (section 12 of the regulation).

Amount of the Survivor Allowance

14. We recommend that ss. 11(2) and 12(2) of O.Reg. 332/84, as amended, be amended by replacing the words "one-half" with "sixty per cent" in each instance.

Amount of the Reduced Group Life Insurance

15. We recommend that s. 31a of O.Reg. 332/84, as amended, be amended to provide Provincial Court judges who have left office, met the basic service requirement or reached the age of 70 with $3000 in life insurance coverage. The present annual stepwise reductions in such coverage should be discontinued.

Indexing

16. We recommend that O.Reg. 332/84 be amended to provide that survivor allowance payments be adjusted, effective April 1, 1987, in accordance with increases in the salaries of the judges of the highest judicial rank held by the judge in respect of whom the survivor allowance is paid.

The Cost of Pension Benefits

17. We recommend that, effective April 1, 1987, Provincial Court judges be required to contribute a percentage of salary equal to half the cost of the combined survivor benefits, as determined annually by the Ontario Government Actuary.

Interest on Refunded Contributions

18. We recommend that the interest owing on refunded contributions continue to accrue until the date the refund is paid to a judge or to his or her estate.

Retroactive Effect of Our Recommendations

19. We recommend that, effective April 1, 1987, the income continuity payments recommended in this report apply to judges who were active on October 1, 1979. We recommend further that, effective April 1, 1987, the survivor allowance recommended

in this report apply to the eligible spouses or children of judges who were active on October 1, 1979.

20. We recommend further that the fourth line and the last line of subsection 43-(3) of Ontario Regulation 332/84 be amended by striking out, in each case, "the 1st day of July 1984" and inserting in lieu thereof "the 1st day of April 1987".

21. We recommend further that the fourteenth line of subsection 45-(1)(6) of Ontario Regulation 332/84 as amended be further amended by striking out "45 percent" and inserting in lieu thereof "55 percent."

Discretionary Pensions

22. We recommend that O.Reg. 332/84 be amended to confer discretion on the Lieutenant Governor in Council to award survivor allowances, in initial amounts it thinks fit, to the spouses or eligible children of deceased former judges who, while they were alive, were entitled to seek discretionary relief under ss. 22, 43(5) or 45(2) of the Provincial Judges Benefits Regulation.

Exemption from the Pension Benefits Act, 1987

23. We recommend that the Ontario government continue exempting the pension plan for Provincial Court judges from the Pension Benefits Act, 1987.

Sickness and Disability Benefits

24. We recommend that section 68 of Regulation 881, as amended, cease to apply to Provincial Court judges. Instead, we recommend that the Provincial Judges Benefits Regulation be amended to give the Chief Judge discretion to require any judge to submit a medical certificate in respect of time away from work because of illness or injury.

25. We recommend that section 30(6) of O.Reg. 332/84 be amended to read: "In this section, 'total disability' means the continuous inability, as the result of illness or injury, to perform any and every duty of a judge."

Benefits Shared with Provincial Civil Servants

26. We recommend that all forms of compensation provided to Provincial Court judges, except those conferred by statute, be set out in regulations that pertain exclusively to Provincial Court judges, or at least to provincial judicial officers.

The Workers' Compensation Supplement, the Termination Benefit and the Death Payment

27. We recommend that s. 67 of Regulation 881, as amended, cease forthwith to apply to Provincial Court judges. Any special provision for leave at regular salary for work-related injury or illness that occurs within a judge's first 20 consecutive days of work in a given year should be included in the Provincial Judges Benefits Regulation.

28. We recommend that the termination payment and the death payment described in ss. 86-94 of Regulation 881, as amended, cease to be available to Provincial Court judges as of the date our recommendations are implemented.

VACATION AND LEAVE

The Management Compensation Option

29. If our recommendations with respect to annual vacation are accepted, we recommend that the management compensation option cease to be offered to Provincial Court judges, effective January 1 of the calendar year immediately following the year in which our recommendations are implemented.

Annual Vacation

30. We recommend that each Provincial Court judge be entitled to six weeks' annual vacation, and that vacation credits unused in a given calendar year be carried forward into the next year, subject to a maximum total accumulation of twelve weeks.

Special Purpose Leave

Maternity Leave

31. We recommend that Provincial Court judges be eligible for pregnancy leave and maternity allowance irrespective of their length of service when they give birth.

32. We recommend that pregnant Provincial Court judges be entitled to seventeen weeks' maternity leave at regular pay but without sick leave credit accumulation. Judges on maternity leave should continue to be able to apply for up to six months' additional leave without pay consecutive to that period.

Parenting and Adoption Leave

33. We recommend that natural fathers of children born after the father's appointment and males or females who adopt children after appointment to the Provincial Court be entitled to ten days' leave at regular pay with respect to the birth of such children or their first arrival in the family.

Extended Leave, With or Without Pay

34. We recommend that section 75 of Regulation 881, as amended, cease forthwith to apply to Provincial Court judges.

35. We recommend that the Chief Judge be given authority to grant a judge up to three months' leave at regular pay on special or compassionate grounds and up to one year's leave without pay or sick leave credit accumulation. We recommend further that the Lieutenant Governor in Council have power, on the recommendation of the Chief Judge, to grant a judge up to one year's leave of absence with pay on special or compassionate grounds and up to three years' leave without pay or sick leave credit accumulation.

ALLOWANCES

Mileage Allowance

36. We recommend that the Lieutenant Governor in Council provide by regulation that Provincial Court judges be entitled to an allowance of 27.5 cents per kilometre travelled in their private automobiles on assigned judicial duties, with no decrease in this rate as mileage increases.

37. We recommend that Provincial Court judges be entitled by regulation to an allowance of 28 cents per kilometre travelled in their private automobiles on assigned judicial duties in northern Ontario, with no decrease in this rate as the mileage increases.

Other Travel Expenses

38. We recommend that Provincial Court judges be entitled by regulation to reimbursement for all travel and transportation expenses certified by the Chief Judge to be reasonable and to have been incurred in the course of assigned judicial duties.

Meal Allowance

39. We recommend that Provincial Court judges be entitled to reimbursement for reasonable meal expenses incurred in the course of judicial duties, subject only to the Chief Judge's approval.

Conference Allowance

40. We recommend that the Lieutenant Governor in Council provide by regulation that Provincial Court judges be entitled to reimbursement for any fees and other expenses approved by the Chief Judge as reasonable and incurred for attendance at or participation in judicial or legal conferences.

Incidental Allowance

41. We recommend that the maximum amount of the incidental allowance now provided to Provincial Court judges be increased to $2000 annually, effective April 1, 1989.

Representational Allowance for Administrative Judges

42. We recommend that each administrative judge of the Provincial Court be entitled by regulation to an annual representational allowance for reasonable travel and other expenses actually incurred by such judge or his or her surrogate in discharging extra-judicial obligations and responsibilities on behalf of the court. The maximum annual representational allowances should be as follows: (a) for the Chief Judges, $2500 each; for the Associate Chief Judges, $2000 each; for the Senior Judges, $1500 each.

PART-TIME SERVICE ON THE PROVINCIAL COURT

43. We recommend that O.Reg. 228/85 be revoked, and that the Courts of Justice Act, 1984 be amended to prohibit the part-time practice of law by judges appointed to the Provincial Court.

44. We recommend that all Provincial Court judges who retire on or after July 1, 1984 be eligible, subject to ordinary approval requirements for overage appointments, for reappointment to the court on a part-time basis. All such reappointed judges who have qualified at retirement for receipt of income continuity payments should be entitled to receive such payments notwithstanding their reappointment. Reappointed judges should perform such judicial duties as the Chief Judge, in his or her discretion, assigns, and should be paid for the performance of such duties on a *per diem* basis. We recommend further that Provincial Court judges no longer have the option of serving on a part-time basis for a proportion of full-time salary.

CONSOLIDATION OF THE REGULATIONS

45. We recommend that all provisions in regulations that pertain to the compensation of Provincial Court judges be consolidated into a single master regulation. We recommend further that updated copies of that master regulation be provided to every newly appointed Provincial Court judge and from time to time to the other incumbent Provincial Court judges.